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The Extraordinary Chambers in the Courts of Cambodia in a Hybrid System;
The Effects of Politics, Law and History

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Summary

The ECCC is positioned within a hybrid democratic system where politics affect law, and where law does not stand in the way of money and power. This culture follows the Cambodian judges into the ECCC, where it is translated into their practices. The ECCC being a mixed tribunal has both Cambodian and international judges. Allegations of corruption, political interference and kickbacks have circled the Cambodian judges since the opening. This hybrid system, where democratic rules have been adopted but not necessarily practiced, is controlled by the country's long tradition of patronage politics, corruption and impunity where money, power and political favors have enabled the bypassing of the rule of law. The legislature and judiciary is weak. The ruling party is influencing the laws being made and the judges by bribery and extortion etc. This due to decades of a weak legal system, after the Khmer Rouge wiped out all legal and moral norms, and killed almost the entire legal profession. Today's legal system was introduced by the international community in accordance with international standards of justice and does consequently not reflect Cambodian practices. An analysis of research and reports regarding this situation shows that Cambodian laws are not in a strong enough state of being the primary base of the tribunal's jurisdiction and procedure. Politically active figures hold positions in institutions that are supposedly independent and neutral. Hun Sen has made statements seemingly as an attempt to affect the ECCC practices. Disagreements between the Cambodian and international staff have lead to a delay of the process. Conclusively, there is a tendency of the Cambodian judges in the ECCC taking a stance along line the Cambodian politics, while the international judges have taken the opposite. Ergo, this is a sign that the ECCC is not solely independent and neutral. Politics seem indeed to be coming in contact with its practices, and influence cannot yet be excluded.

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1. Introduction

1.1 Scope and Goals

This thesis will examine the effects that Cambodia's hybrid democratic system might have on the Extraordinary Chambers in the Courts of Cambodia (ECCC) and its practices. First, it will look into the structure of the country's political system, the traditional norms and values that compose it and the actors that sustain it. Secondly, it will scrutinize Cambodia's legal system and examine the role of politics in this legal environment. The ultimate focus is on the ECCC and its practices and whether they are affected by these political and legal circumstances that uphold the Cambodian system in which the ECCC is situated. Thus, the connection between hybridity and the ECCC will be studied, where issues such as patronage, corruption, political interference and international standards of justice will be discussed.

Since the negotiations for the tribunal started, it has been questioned whether a tribunal within the Cambodian system will be able to meet international standards of justice. The Cambodian legal system is said to be highly politically interfered with and corrupt. These allegations have surrounded the ECCC since its opening and they are still a pressing issue. Because the ECCC is a mixed court with both national and international staff, political influence might be a more realistic possibility than otherwise in international tribunals. A major issue is allegations of Cambodian staff in the ECCC being politically influenced in the favor of the ruling party Cambodian People's Party, CPP, and judges being corrupt. Prime Minister Hun Sen's public statements about e.g. the number of defendants in the tribunal have enhanced the notion of him trying to interfere with the process. This thesis will inspect the basis for these allegations, their connection to Cambodia's hybrid system and what impact this might have on Cambodia's society. The goal is to broaden the understanding of how an international tribunal is affected by being within the structure of a post-conflict society which has not yet developed into a fully functioning democracy, and what impacts this in turn has on its society. The questions for this thesis are thus:

- ➔ What is the structure of Cambodia's political system?
- ➔ What is the structure of Cambodia's legal system and what place do politics have in it?
- ➔ What is the structure of the ECCC, and how does the hybrid nature of the Cambodian democratic system affect the tribunal and its practices?

This thesis will not focus on the specific cases that are before the ECCC, nor the crimes that will be adjudicated. It takes no stand on whether the defendants are guilty or not.

1.2 Applied Methods and Theory

The method that will be applied in this thesis is an examination of previous research about the Khmer Rouge, Cambodia's legal and political system, the ECCC and the international community's reactions and reports. The approach will be an inter-disciplinary connection between law, politics and society.

The ECCC, its practices and potential influences should not be interpreted without an understanding of Cambodia's legal system. And Cambodia's legal system cannot be understood without taking into account the historical and political setting. The presentation of history and politics serve both as a deeper comprehension of the Cambodian society and legal culture, a tool for understanding today's practices but also as a basis for discussing possible consequences in the ECCC.

Consequently, the research is systematized and presented in its contextual setting, tying together political and legal development, social change, history, tradition, economic factors and international influences. Hence, the thesis does not rest on the traditional legal dogmatic method and its technicalities, seeing as the objective is not specific legal documents, cases or rules. The focus is on the ECCC setting in a broader perspective taking into account possible variables of influence. However, the legal doctrine is of great importance in this thesis as well as historical research. Doctrine, historical literature, legal documents, articles, web pages, political and legal theories will be used as tools. Naturally, one must also realize that the application of one theory or more means the exclusion of other. Different theories can explain different kinds of actions of a state and within a state depending on the starting-point. Depending on what view one takes, such as legal, political, societal or international, many theories can be relevant. Due to the constraints of length and space in this thesis, it would not do the vast number of theories that apply to the subject matter justice to be addressed shortly in this paper. For this reason I have chosen to only focus on the theories that I will apply, which will be explained later on. My research will be interpreted and analyzed into answers to the questions put forth in this thesis.

1.3 Disposition of the Thesis

First, a historical background to today's Cambodia is presented in Chapter Two. Chapter Three presents the Cambodian political system, its development and its consequences. This is

then analyzed in Chapter Four through three approaches: a conservative, a societal, cultural and traditional as well as an economic. This gives the basis for Chapter Five which focuses on Cambodia's legal system, the development to this date and the influences involved. Chapter Six is the main focus of the thesis, which explains what events lead up to the development of the ECCC, gives the background to the negotiations on the tribunal and the results of them, it sets the tribunal in the Cambodian legal and political setting and presents critiques and potential problems along with hopes and expectations. Chapter Seven then analyzes the legal development and its effects on the ECCC through three approaches: international relations constructivism, social constructivism and sociology of law. The thesis ends with Chapter Eight and my concluding remarks.

2. Historical and Political Background to Today's Cambodia

For a long time, Cambodia was not an independent country. It was under French colonial rule from 1863 until 1953 when King Sihanouk succeeded in achieving independence through peaceful methods.¹ Although the French made Sihanouk king of Cambodia in 1941, he was not the one exercising effective control over the country. But Sihanouk was determined to achieve independence. The 1945 declaration of independence made the French tighten their control by abolishing Cambodian street names and holidays and restored the French ones,² but their grip would loosen a few years later, and Sihanouk would finally succeed.³

He started off with a peaceful coup against his own government to remove the democrats, which were the leading political party, from the cabinet. He then started governing the country even though he never got official mandate for it.⁴ In 1953 the French rule collapsed; the war in Vietnam was not going well for them and the increasing fighting in Cambodia was not making it better. Although the French kept the economic power over the kingdom, Sihanouk was now granted efficient control over Cambodia.⁵ His next step was to abdicate the royal throne and designate it to his father. He then created his own conservative political party, the Sangkum, and after winning the elections in 1955 he began ruling the

¹ Brott mot mänskligheten under kommunistiska regimer, p. 72 (my translation)

² Chandler, p. 211

³ Op. cit., p. 216

⁴ Ibid., p. 225

⁵ Ibid., p. 227

country as Cambodia's prime minister. He continued to rule the country after the death of his father, titled as Prince Sihanouk.⁶

In the 1960s, Sihanouk worked hard to keep Cambodia outside of the Vietnam War, in which he succeeded.⁷ But a series of negative decisions lead to a weakening of his rule and strengthening the Communists. He alienated himself with the U.S and South Vietnamese,⁸ a decision supported by the Chinese which were Sihanouk's big patrons. He secretly let the North Vietnamese use Cambodian territory in the Vietnam War.⁹ The cut off from the U.S. meant the end to diplomatic relations and economic aid. This was a poor decision since this aid contributed to Sihanouk's military forces' pay and 15 percent subvention of the national budget. He thereafter nationalized the foreign trade, which lead to losses of revenue since the commercial elite now secretly was trading with the Communists in Vietnam. A lower pay also lowered the military's morale, rendering his force weaker. The economy kept getting worse as Sihanouk was ignoring agricultural problems and mismanaging the state-controlled industry.¹⁰ This poor situation, alongside with the Communists' success in Vietnam made the Communists in Cambodia grow stronger.¹¹

In 1968, the Communist Party of Kampuchea (CPK) declared armed struggle against Sihanouk's government,¹² after which Saloth Sar, Pol Pot's birth name, and his followers withdrew to the jungles in northeastern Cambodia. Sar had gained confidence after a visit to China where the Cultural Revolution had inspired him and he found new patrons in the radical Chinese. He established the CPK's headquarters in the jungles and started taking over the surrounding areas, going from village to village and primarily killing the local leaders and appointing their own.¹³ One of their "new" strategies was to use children as soldiers, who could be shaped into performing any task. And so, this is how the Khmer Rouge started developing their revolutionary organization, planning and preparing for a taking of Cambodia.¹⁴ However, in 1970 with the coup d'état, they were beaten to it and the country was taken over by other opponents to Sihanouk; his own cabinet.¹⁵

⁶ Brott mot mänskligheten under kommunistiska regimer, p. 72 (my translation)

⁷ Chandler, p. 242

⁸ Op cit., p. 235-36

⁹ Ibid., p. 237

¹⁰ Ibid., p. 244-46

¹¹ Supra at note 6.

¹² Etcheson p. 3

¹³ Chandler p. 247, Etcheson p. 5

¹⁴ Etcheson p. 6

¹⁵ Chandler p. 248-50

The collapse came after prince Sihanouk went on a trip to France, leaving the country to the prime minister Lon Nol and his deputy prime minister prince Sisowath Sirik Matak (Sihanouk's cousin).¹⁶ While Sihanouk was gone, the pro-Western Matak and three army officers made Lon Nol sign a vote against the Prince. With that vote, the National Assembly voted down Sihanouk and removed their confidence from him. Matak had not been a supporter of Sihanouk's policies for some time due to the mismanagement of the economy, the alienation from the U.S and the presence of the Vietnamese bases on Cambodian soil.¹⁷ The new government immediately turned against the Vietnamese and gave an order of evacuation. This brought with it enormous changes in the strategic landscape of Cambodia; PRC, USSR and the North Vietnamese did not only turn against the new government now, but also started assisting the Khmer Rouge. However, the U.S. were supporters of Lon Nol; America was at war with Vietnam, and Cambodia alienating themselves with all Vietnamese suited them well. Lon Nol's Khmer Republic could therefore survive for four years with the help from the U.S. which provided economic assistance,¹⁸ and bombing to protect the regime from the growing Communist forces.¹⁹

This bombing was called Operation Menu and was supposed to be a bombing of the areas bordering to Vietnam. However, the targets were many times indiscriminate, killing up to as many as 600,000 civilians. This operation has been widely condemned by the rest of the world, with many people seeing it as an American war crime. Ultimately, many people believe that this operation was one of the reasons that the Khmer Rouge could gain power over Cambodia. This drove Cambodians in distress, which the Communist forces could benefit from since the people were more easily recruited to the Khmer Rouge.²⁰

After Lon Nol took over, the Khmer Rouge did not give up the quest for Cambodia and nor did Sihanouk who was now in exile in Beijing. He formed an alliance with China, North Vietnam and the National Liberation Front of South Vietnam.²¹ He created the National United Front for Kampuchea, FUNK, and declared war against those who had overthrown him. Sihanouk was however just an instrument for the Khmer Rouge, which used FUNK to gather recruits for their own plans. Sihanouk, being in China, could not exercise any efficient control in Cambodia. Eventually the Khmer Rouge started cleaning up within FUNK, killing

¹⁶ Gottesman, p. 22

¹⁷ Chandler, p. 248

¹⁸ Op.cit., p. 252

¹⁹ Kiernan and Owen, available at: http://www.yale.edu/cgp/Walrus_CambodiaBombing_OCT06.pdf 23 November 2009

²⁰ Op. cit.

²¹ Supra at note 16.

Sihanouk's supporters, ethnic Vietnamese and even their own allies if suspected of disloyalty.²²

Meanwhile, from 1971-1975, the Khmer Republic experienced violent years without a strong leadership. The war and the sudden aid from the U.S. worsened life in Phnom Penh. It corrupted generals, officials, medicine and other relevant parts of the societal sectors that were connected to the economy of war.²³ The U.S. managed to postpone a Communist victory by bombing the surrounding areas of Phnom Penh in 1973,²⁴ but ordinary people were terrified by the bombings and it drove them into the arms of the Khmer Rouge. It also led to a lack of farmland, which together with the Khmer Rouge uprising resulted in driving more than 750,000 rural Cambodians into the cities, a majority of them to Phnom Penh.²⁵ Additionally, the Khmer Rouge had already assumed mass murder as a strategy, now using it where serving their agenda.²⁶ Collectivization and compulsory cooperatives were established in some areas that they controlled. Even though the people heard about this in Phnom Penh, they dismissed it as propaganda thinking that the Khmer Rouge was under Vietnamese control. They would be proved wrong.

In 1975 the Communists started starving Phnom Penh; they cut off shipments of rice and ammunition by mining the riverside. The U.S. tried providing aid and ammunition by air, but it was not enough to feed the people or defend them. The city was full of millions of refugees. Lon Nol fled the country. The U.S. tried to negotiate with Sihanouk but without success.²⁷ Cambodians that were wealthy enough managed to flee, as did the American embassy personnel. The city life was now falling apart with people begging on the streets, refugee camps raging with diseases, the social services being nonfunctional and the administration being ruled by corruption.

This made students believe in the revolution and therefore join the Khmer Rouge, which were getting stronger and stronger.²⁸ When the insurgency got so strong, and rockets

²² Etcheson, p. 6-7

²³ Supra at note 16.

²⁴ Supra at note 19. "The last phase of the bombing, from February to August 1973, was designed to stop the Khmer Rouge's advance on the Cambodian capital, Phnom Penh. The United States, fearing that the first Southeast Asian domino was about to fall, began a massive escalation of the air war — an unprecedented B-52 bombardment that focused on the heavily populated area around Phnom Penh but left few regions of the country untouched."

²⁵ Gottesman, p. 24

²⁶ Chandler, p. 252-253

²⁷ Op.cit., p. 254

²⁸ Supra at note 25

began firing, Lon Nol ordered his troops to surrender. The next day, on April 17th 1975, the KR succeeded in taking over Phnom Penh. Cambodia was now theirs for the taking.²⁹

Kiernan holds that the atrocities that began on this day in 1975 happened with foreign consent. Because of the Cold War politics, it was important for the U.S. to stay on good terms with China, and since Mao's China was the Khmer Rouge's biggest allies, it made way for a diplomatic climate wherein Pol Pot could rule Cambodia without interference from the Great Powers.³⁰

People were at first not aware of what the revolution meant, but hoped that it would bring a change into the horrific life situation that most people now felt in Phnom Penh. This would however not be the case.³¹ In Kiernan's interviews, witnesses told that the Khmer Rouge first concentrated on disarming the Lon Nol soldiers, ordering them to strip down their uniforms, wherever they found them. Then the order of evacuation came, and the Khmer Rouge soldiers went from house to house making sure that everyone left. The order was to go anywhere, just out of the capital.³² No exceptions were made and even hospitals were emptied. Ergo, many sick and old people died along the way, since no food or medical attention was given.³³ Without highly populated areas, i.e. towns, people were far easier to control, since they had nowhere to turn if they wanted to express resistance and demands. And with nowhere to gather, communications between citizens were made difficult.³⁴

Executions started with the former regime's military officers, top down, thereafter their civil servants and finally anyone who was suspected of harboring enemy values or dissenting. Education and even eyeglasses was seen as indications of this and could result in execution.³⁵ The country was divided into two types of people; people from the cities were proclaimed as "new people" and people from the rural areas as "old people".³⁶ The propaganda that came from the leaders was that the city people were immoral exploiters which have had a much easier life than the peasants.³⁷ The motto against them was the infamous "to keep you is no gain, to lose you is no loss".³⁸

²⁹ Kiernan, p. 34

³⁰ Kiernan (2008), p. 1-2

³¹ Gottesman, p. 25

³² Kiernan, p. 35

³³ Supra at note 31.

³⁴ Kiernan, p. 64

³⁵ Etcheson, p. 7

³⁶ *Brott mot mänskliga rättigheter under kommunistiska regimer*, p. 74 (my translation)

³⁷ Kiernan, p. 62

³⁸ Khamboly, Documentation Centre of Cambodia 2007, available at: <http://www.dccam.org/Publication/Monographs/Part1-1.pdf> 28 November 2009

The leaders isolated the country on the international arena as well; the borders were closed, foreigners expelled, all means of international communication cut off. At first, there was no word of the Khmer Rouge leaders and their ideology. Officially, Sihanouk was the head of state and the new leadership was referred to as Angkar, the Organization.³⁹ A new constitution came in January 1976 and the country was now called Democratic Kampuchea. A couple of months later, Pol Pot (still under secret identity), was declared as the prime minister and Sihanouk was placed in house arrest. It was not until 1977 that Pol Pot's real identity, Saloth Sar, was revealed after which he acknowledged the existence of the Communist party and their ruling of the country.⁴⁰

The policy of Democratic Kampuchea was one of uniformity and all personal goods were abolished, as well as all markets and currencies. The constitution meant that "all important means of production" would be collectivized and there were no constitutional rights except for "the right to work".⁴¹ The goal of the new regime was to increase the production of rice and thereby increase the export of it, and use those earnings to develop the agriculture and industrialize the country.⁴² And so, with the exception of leaders and soldiers, everyone had to work every day at least as long as there was daylight, including children. Consequently, a lot of people worked themselves to death, especially the "new people" since they were not used to that kind of hard bodywork. The housing situation was forced collectives, food was distributed by the soldiers, and everyone had to wear the same clothes. Families were torn apart and men were commonly separated from women as well as children from their parents. The Khmer Rouge organized marriages that they thought fit. Extramarital sexual relations were prohibited and could result in death penalties. Children were indoctrinated into the Khmer Rouge ideology and forced to spy and report on their parents.⁴³

Despite the hard labor, the crops were not as good as the Khmer Rouge was expecting, resulting in diseases caused by malnutrition and death by starvation. The executions were at first concentrated on the old regime's followers, intellectuals, formerly rich people, minorities and anyone who expressed dissent. Then, people would randomly be targeted for execution because of some reasons that the soldiers thought they had for suspecting disloyalty. Many times, they would make up reasons. And after a while, the leaders had to blame the disappointing harvest on someone, and so cleansing within the own Party started and did not

³⁹ Gottesman, p 25

⁴⁰ Brott mot mänskliga rättigheter under kommunistiska regimer, p. 75 (my translation)

⁴¹ Gottesman, p. 26

⁴² Supra at note 40.

⁴³ Supra at note 41.

stop until the regime's fall.⁴⁴ 1.7 million People were killed, which at that time was approximately 20 per cent of the population.⁴⁵

The Khmer Rouge's killing went beyond Cambodia's border as they thought that they were at war with their neighbors. Especially suspicious of Vietnam, they terrorized the Vietnamese areas around the borders with raids of massacres in Vietnamese villages. This went on for years, until Vietnam could not take it anymore and put an end to Democratic Kampuchea (DK). On December 25th, Vietnam invaded Cambodia and the Khmer Rouge was defeated on January 7th 1979.⁴⁶

Vietnam immediately set up a new regime, the People's Republic of Kampuchea (PRK). Some of the former Khmer Rouge cadre that had fled the internal CPK cleansing had joined forces with Vietnam and was now part of the new regime. One of them is today's prime minister Hun Sen. PRK held a trial against Pol Pot and Ieng Sary in absentia and sentenced them to death, but this was never recognized by the international community.⁴⁷

Even though the Khmer Rouge was defeated, they kept terrorizing the country from camps that they established along the Thai border after their flight and the war between the new Vietnamese installed regime PRK and the Khmer Rouge was ongoing during the whole Vietnamese occupation.⁴⁸

Vietnam had its supporters in the international world, as well did the Khmer Rouge. Cold war fears and politics played a big part in which sides the international world chose. Fear of expansion was a big issue and the balance of power therefore important. Moscow and the Eastern Bloc, being far away, got on the PRK's side. China and the other ASEAN countries, being in the region, were afraid that Vietnam would try to expand through Cambodia and therefore got on the Khmer Rouge side. U.S. on the other hand was still balancing off power with Soviet, and therefore in temporary alliance with China, resulting in an indirect American support of the Khmer Rouge.⁴⁹ The UN Security Council even tried to condemn the Vietnamese occupation by a resolution against it, but it was vetoed by Soviet. On the other hand, even against the reappeared Sihanouk's recommendations, the UN General

⁴⁴ Gottesman, p 27-28 and supra at note. 40

⁴⁵ Brott mot mänskliga rättigheter under kommunistiska regimer, p.71 (my translation), See also Kiernan (2008), p. 271 that says that the death toll is between 1.671 and 1.871 million

⁴⁶ Etcheson, p. 8

⁴⁷ Linton, p. 40-41

⁴⁸ Supra at note 46.

⁴⁹ Gottesman, p. 43 and Roberts, p. x-xiii

Assembly voted on the Cambodian UN seat, and the clear majority chose to grant the seat to the exiled government of Democratic Kampuchea.⁵⁰

With the collapse of the Soviet Union, there was yet again a shift in world politics. For the PRK, that meant a much weaker assistance,⁵¹ causing the Vietnamese forces to leave the country in 1989 without any transitional measures to help the remaining PRK regime. The four factions in Cambodia now came to a deadlock in the opposition, a situation that alarmed the international community, which decided to push for peace between the different parties.⁵² This pressure led to the signing of the Paris Peace Accords in 1991 resulting in a transitional UN operation, the United Nations Transitional Administration in Cambodia (UNTAC), with the goal of establishing peace and democracy in Cambodia. The four factions to the war were now arranged under the leadership of Prince Sihanouk and the competition for power was to be made peacefully, ending in democratic nationwide elections in 1993. Concurrently the Supreme National Court (SNC) was created and vested with sovereignty. These two organs succeed in facilitating a safe come back for hundreds of thousands displaced people, they established a human rights regime, improved the country's infrastructure and made sure that there was peace on the ground.⁵³ However, nothing was expressed about the Khmer Rouge atrocities and responsibility for eventual trials was placed on a future government.⁵⁴ And even though the UN intervention in Cambodia is seen as the biggest success so far, it did not fundamentally change the situation in Cambodia. The war between the factions still went on and the ones with power acted with impunity. UN succeeded in bringing forces together against the Khmer Rouge, but could not prevent the Khmer Rouge or the other military forces from violating human rights.⁵⁵ UNTAC had no military mandate; it could not enforce the decisions they made nor could they impose sanctions if the decisions were not followed. Essentially, it was a case of voluntariness to obedience.⁵⁶

Still, UNTAC succeeded in holding free and fair elections. And even though Khmer Rouge threatened to kill anyone who participated in them, it did not stop 90 percent of the eligible Cambodian people to register, and 89 percent of those to actually vote.⁵⁷ After the 1993 elections, Sihanouk's United National Front for an Independent, Neutral, Peaceful and

⁵⁰ Gottesman, p. 44

⁵¹ Linton, p. 41

⁵² Supra at note 46.

⁵³ Linton, p. 43

⁵⁴ Op.cit., p. 42

⁵⁵ Human Rights Watch, *Cambodia at War*, available at: <http://www.hrw.org/legacy/summaries/s.cambodia953.html> 05 September 2009

⁵⁶ Findlay, p. 15

⁵⁷ Etcheson, p. 41

Co-operative Cambodia (FUNCIMPEC), came out as the winner,⁵⁸ but the second runner up, the Cambodian People's Party (CPP), who had been the ruling party, refused to give up their power.⁵⁹ And after a political mess, a coalition government was created between FUNCIMPEC and CPP without one single leader, but with two prime ministers. Prince Ranariddh became the first prime minister, representing the royalists and Hun Sen the second, representing the CPP. But despite the objectives of the new coalition, it was widely known that the CPP "still had all the power".⁶⁰ After the elections, UNTAC left Cambodia.⁶¹

Hun Sen has been and is one of those leaders hugely important for Cambodia's governance. He started out as a foreign minister in the Ministry of Foreign Affairs for the PRK where he set the basis for his politics on a non-communist, non-ideological ground. He offered positions to intellectuals, which were usually not communists.⁶² He set out to establish a friendly bilateral relationship with Vietnam.⁶³ At the same time, the PRK tried to bring back the Cambodian culture that the Khmer Rouge completely had dissolved.⁶⁴ He extended his influence quickly. He became deputy prime minister in 1982 and by the time he became prime minister in 1985, he had already a wide network of people working for him, setting the ground for a state administration.⁶⁵

With the PRK takeover, the 1980s set the conditions for a system of patronage politics. A number of former low-level cadres that were working under Hun Sen were not loyal and accepted bribes for favors. A number of his personnel were involved in the black market.⁶⁶ Because the economy was so poor, many people joined in the party and became active politicians for the sake of collecting taxes and bribes, and sharing with their superiors. And so the bureaucracy for patronage politics grew. Eventually it grew faster than the party, and became a system that worked separately from the Party politics.⁶⁷ This system became even stronger towards the end of the 1980s as the PRK was privatizing the state industries. They needed quick money for the war that they were trying to win and sell-offs provided that.⁶⁸ But these sell-offs, alongside with the uncertainty about the political future, brought

⁵⁸ Linton, p. 44

⁵⁹ Supra at note 57.

⁶⁰ Op.cit., p. 49

⁶¹ Supra at note 57.

⁶² Gottesman, p. 211

⁶³ Op.cit., p. 209-211

⁶⁴ Ibid., p. 218

⁶⁵ Supra at note 62.

⁶⁶ Op.cit., p. 207-208

⁶⁷ Ibid., p. 211

⁶⁸ Ibid., p. 318

with it corruption, especially in the country-side. Land was distributed internally between the military and local officials and competing claims about land were solved with more bribes. It all got very much out of hand. The Party did not show any interest of putting an end to the corruption, neither did the courts.⁶⁹ The Party status itself did not give any money or favors back, while patronage applied to every level in the bureaucracy, making its foothold stronger than ever.⁷⁰

In a patronage system there is unsurprisingly no respect, or very little respect for the law, which was a big complaint about Hun Sen's government before the 1993 elections, especially by the Ministry of Justice.⁷¹ Even the general prosecutor of the Supreme Court issued a report on the lawlessness of the regime.⁷² Eventually, the Council of Ministers established their own Legislation Office, pitting them against the Ministry of Justice even more.⁷³ For Hun Sen and his followers, loyalty and the war against resistance⁷⁴ was more important than the judicial process.⁷⁵ Patronage politics was and continues to be the tool for power.

Ergo, the Khmer Rouge demolished the Cambodian society with their atrocities and politics. But even after the Khmer Rouge left Cambodia's political arena, the ghost of their evils continued to haunt the Cambodian society, along with other politics having a strong grip on the people and their lives.

⁶⁹ Ibid., p. 321-24

⁷⁰ Ibid., p. 330

⁷¹ Ibid., p. 238

⁷² Ibid., p. 255

⁷³ Ibid., p. 216

⁷⁴ Ibid., p. 222

⁷⁵ Ibid., p. 253

3. The Cambodian Political System

3.1 Cambodia as a Hybrid Regime

Cambodia is usually referred to as a hybrid democracy. A society that has democratic institutions, but at the same time has government officials that use and abuse the rules of democracy for the sake of obtaining authoritarian power to the extent that it cannot be seen as a de facto democracy, is called a hybrid regime as explained by Levitsky and Way.⁷⁶ However, it is not the same as full-scale authoritarianism, nor are the typical modern day requirements for a democracy met in it. Levitsky and Way identify modern democratic regimes based on four basic requirements: “1) Executives and legislatures are chosen through elections that are open, free, and fair; 2) virtually all adults possess the right to vote; 3) political rights and civil liberties, including freedom of the press, freedom of association, and freedom to criticize the government without reprisal, are broadly protected; and 4) elected authorities possess real authority to govern, in that they are not subject to the tutelary control of military or clerical leaders.” This is not to be confused with flawed democracies where the regime might be inefficient and breaking some rules, but that still meet the basic requirements for a democracy.⁷⁷

Cambodia is a democracy in that it has democratic institutions and periodically held elections that are seen as sufficiently free and fair.⁷⁸ But as Kheang Un points out, beneath these democratic institutions there is a web of institutional strings that the ruling CPP are pulling and thus restricting effective political competition in rural Cambodia.⁷⁹ Using Levitsky’s and Way’s definition, Kheang Un declares that Cambodia is a hybrid regime “stuck between outright authoritarianism and full-fledged democracy”.⁸⁰ One major party is dominating the electoral arena and has been dominating it for a very long time, the CPP along with their leader Hun Sen.⁸¹

⁷⁶ Levitsky and Way, p. 53 found at: <http://www.la.wayne.edu/polisci/kdk/global/sources/levitskyandway.htm> 04 October 2009

⁷⁷ Op.cit., p. 53

⁷⁸ Kheang Un, p. 205 available at: <http://www.asianperspective.org/articles/v29n2-g.pdf> 08 October 2009

⁷⁹ Op.cit.

⁸⁰ Ibid., p. 204

⁸¹ Supra at note 76.

3.2 The Development of Cambodia's Political System

3.2.1 Early Political Developments and the Elections of 1993

Since the Cambodian independence, the country has experienced a long duration of political instability. King Sihanouk ruled during the first 15 years of independence but caused turbulence, such as between the relations of Vietnam and US. The Lon Nol period before the Khmer Rouge was an unstable time where the outcome of the political struggles was unsure.⁸² When the Khmer Rouge took over, the country and its people saw a never before seen political ideology. Their revolution was an extensive one, wiping out everything that was formerly known, changing the very core norm of society. And so, because of this complete transformation, going back to even status quo requires a wide-ranging change in the political structure, Fernando holds. Thus, what had to happen after 1979 until at least 1989 when the Paris peace talks started was yet another fundamental change from the Khmer Rouge's norms to the new ones that were introduced.⁸³

After the PRK takeover in 1979, Hun Sen was fast to gain power over the nation. Before the UNTAC elections, he had gained knowledge in the international arena, especially UN, become prime minister, developed a wide administration of trust from his colleagues and he had overcome any domestic political rivalry and international efforts to bring him and his regime down. He was not planning on giving this power up.⁸⁴ The 1993 elections was the first time the CPP and Hun Sen experienced a challenge to the party. And so, CPP's use of political violence came into the picture. The fact that they were in power for so long made the usage of the state machinery favorable to them. Even if FUNCIMPEC won the UNTAC sponsored elections in 1993, Hun Sen made sure that he was still in a coalition government, holding a post as co-prime minister. Important to recall is that after 1979 takeover and before the 1993 elections, CPP had ruled Cambodia uncontested.⁸⁵

Going back to the subject of the Paris Peace Accords, the terms that were agreed after this, even though democratic, do not express the reality of the Cambodian way of life which therefore makes them surreal and mere words on paper. Democracy in all its beauty cannot change the culture, values and ideals of a country just by being stated in a document. This is why Linton asserts that these terms, even if agreed upon, do not guarantee institutions that

⁸² The Economist Intelligence Unit (EIU), *Country Profile 2008*, p. 4, available at www.eiu.com 04 October 2009

⁸³ Fernando, available at: http://www.ahrchk.net/pub/mainfile.php/cambodia_judiciary/112/ 07 October 2009

⁸⁴ Etcheson, p. 30-31

⁸⁵ Kheang Un, p. 210

will uphold them, since the Cambodian legal system was severely flawed to start with, and is still flawed today. She claims that, even though many laws have been passed since the Constitution was promulgated, the leaders of the country do not want this system of democracy, since the system remains corrupted and unfair.⁸⁶

Yes, democracy and peace was presented by the UNTAC, but to change the back bone of a society, it takes more. “One UN-administered election does not make a democracy”, Etcheson stresses.⁸⁷ Like Fernando holds, it takes more than just one elite replacing another to change a society, and even if at the same time a liberal norm is presented, it cannot fundamentally change the political environment at once, unless there is an active movement from all sides to fulfill it.⁸⁸

Needless to say, the elections did not change Cambodia’s political environment. Even if FUNCIMPEC got the majority of votes, Hun Sen thrived in a political culture where he had many loyalists, securing him a continuation of power.⁸⁹ However, after the cold war, a state’s legitimacy became very important for its recognition in the international community. According to Kheang, this is a realization that the CPP got after the 1993 elections, which is why it was important for them that the elections were seen as free and fair. More importantly, international recognition means financial and technical support from bilateral and multilateral sources. In fact, Kheang shows, approximately half of the governmental budget came from such sources in the past ten years.⁹⁰

Another lesson that the CPP learned after the 1993 elections was the manipulation of patronage politics. During the first years of the 1990s, patronage networks controlled Cambodia and its political landscape more than the CPP, but towards the end of that decade, Hun Sen had turned that into his advantage and successfully tied himself to business tycoons and military leaders.⁹¹

⁸⁶ Linton (2005), p. 16-18

⁸⁷ Etcheson, p. 42

⁸⁸ Supra at note 83.

⁸⁹ Supra at note 85.

⁹⁰ Kheang Un, p. 211

⁹¹ Op.cit., p. 218

3.2.2 Electoral Manipulation and the Elections of 1998

Even if there was a relative political stability during the coalition time, the co-prime ministers were striving for more power and could not rule in agreement. Hun Sen and his party staged a coup d'état in 1997 after which National Assembly elections were held. The most typical kind of abuse in these types of regimes is the violation of electoral rules where competition is eliminated either de jure or de facto. Typical characteristics of elections in hybrid regimes are large-scale abuses of state power and lack of transparency combined with harassment of opposition.⁹²

CPP's campaign in the 1998 elections was a campaign covering extensive parts of the voters' everyday lives. They created an environment in the villages, where the villagers felt they were friends with the CPP and members of a bigger community; the villagers got CPP membership cards and there was also the distribution of gifts. Although the gifts were small, they were representative of the protection that the villagers got, and so the annulment of gifts meant annulment of that protection. Moreover, the villagers were organized in groups of ten with local CPP supporters as group leaders. One of the instructions that the leaders had was to create a relationship with the voters that would sustain until the election, and when the time came the leaders would escort their respective groups to the polls. Another instruction was to collect thumbprints. This was often accompanied with subtle threats against personal security together with pledges of allegiance that were intertwined with rituals and religion. Thus, this was a widespread form of intimidation fused with symbolism that together with the impact of the 1997 coup created an aura of fear.⁹³

A Human Rights Watch report stresses the fact that these elections took place in an environment where the CPP controlled all the significant government and state institutions.⁹⁴ Nevertheless, gaining 41% (FUNCIMPEC got 32 % and the Sam Rainsy Party, SRP, got 14 %) of the votes did not give the constitutionally required qualified majority to rule the country. Once again CPP had to form a coalition government. Negotiations were prolonged and not until the King intervened did they agree to once again form a coalition with FUNCIMPEC, however with Hun Sen as the single prime minister.⁹⁵

⁹² Levitsky and Way, p. 54-55

⁹³ Hughes, p. 68-72

⁹⁴ Human Rights Watch (HRW), *World Report 2009*, p. 230 available at: http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf 11 September 2009

⁹⁵ EIU, *Country Profile 2008*, p. 5

Kheang positions that the outcome did not only result in CPP strengthening its power as a party, but also Hun Sen as an individual leader.⁹⁶ On the other hand, according to Kheang, the coup d'état resulted in a major drawback for the Cambodian democratization, inducing the public with fear of regression to authoritarianism. However, the elections continued.

3.2.3 Political Turbulence and the Elections of 2003

The National Assembly elections in 2003 were preceded by political violence and there was a number of high profile killings and voting intimidation.⁹⁷ Human Rights Watch reported that at the time both international and local NGOs had stated that the CPP were responsible for the organized violence and intimidation. Political pluralism was still not a developed establishment in Cambodia's society, and the CPP actions as a party were difficult to distinguish from the actions of the state.⁹⁸

Kheang points to the importance of rural Cambodians for the CPP. The urban voters are more likely to be affected by issues such as corruption, unfair working conditions and treatment of small businesses etc. in their everyday lives, which is why they are more inclined to vote for opposing parties that support their opinions. The SRP's growing popularity is an indication of this being true. Seeing as rural Cambodians make up the clear majority of the population, having their support is incredibly important. This makes them the focal point of election races. What gave the CPP an even stronger foothold in the political landscape was the decentralization of politics to the rural areas. Until the first commune elections in 2002, the commune chiefs appointed were the ones from the PRK era. This made the patronage network more extensive, and the CPP could grow stronger through gift-giving and support of the development local infrastructure.⁹⁹ Under this hybrid democracy, votes are sealed by CPP officials visiting the countryside, bringing donations and promises of more donations for the

⁹⁶ Kheang Un, p. 207

⁹⁷ EU EOM, *Kingdom of Cambodia Final Report*, p. 8, available at: http://www.euomcambodia.org/English/PDF/PDF/Final%20Report/final%20report/English/EU_EOM_Final_Report_Com.pdf 12 September 2009

⁹⁸ HRW, *The Run-Up to Cambodia's 2003 National Assembly Election, Political Expression and Freedom of Assembly under Assault*, available at: <http://www.hrw.org/legacy/background/asia/cambodia/cambodia061203.pdf> 15 September 2009

⁹⁹ Kheang Un, p. 212-214

exchange of political support.¹⁰⁰ Therefore, the commune elections in 2002 were an easy win for the CPP.

Unsurprisingly, patronage politics was CPP's main instrument to gather votes for the National Assembly elections as well, and according to Kheang, the villagers he himself talked to before the 2003 elections explained that they voted for the CPP because of the party's ability to offer material benefits, e.g. refurbish roads that needed to be repaired.¹⁰¹ By 2003, Hun Sen had devoted himself to development projects, as well as his wife Bun Rany Hun Sen. His strategy was to win people's trust over, through the use of the purse. An example is that he built 2,232 schools, while she built and financed three development centers "out of their 'own pockets'". In reality, the money came from foreign aid or loans but the projects were opened in their names.¹⁰²

Media is also a focal point in a hybrid regime, where it might be censored and state-owned but with some independent outlets playing a very important part in offering some transparency to the government's actions.¹⁰³ Most Cambodians watch TV or listen to the radio; this is the principal way of getting information. It then comes as no surprise that power over the media is crucial, something that CPP has had power over for some time now. There are six TV stations in Cambodia, all of them owned by or affiliated with the CPP. There are thirteen radio stations in Cambodia, only two of them are completely independent and one is owned by FUNCIMPEC. The control of these outlets is exercised through promotion of the CPP and especially Hun Sen, not to mention through exclusion of the opposition. Ergo, controlling the media means controlling the provision of information, a crucial weapon in times of elections.¹⁰⁴

The outcome of the elections was the same as earlier, CPP got the majority of the votes but there was no qualified majority for any party, resulting in a political stalemate that was still ongoing in 2004.¹⁰⁵ To break this deadlock and avoid more lengthy delays, the previous requirement for qualified majority was now changed to a simple majority by the National Assembly (who was since earlier dominated by the CPP) with an addendum to the

¹⁰⁰ Op.cit., p. 221

¹⁰¹ Ibid., p. 222

¹⁰² Ibid., p.220

¹⁰³ Levitsky and Way, p. 56

¹⁰⁴ Kheang Un., p. 215-216

¹⁰⁵ U.S. Department of State, *Profile: Kingdom of Cambodia*, available at: <http://www.state.gov/r/pa/ei/bgn/2732.htm> 15 September 2009

constitution. Another coalition was created between the CPP and FUNCIMPEC with a power share of 60/40.¹⁰⁶

Both the 1998 and the 2003 elections were contested as fraudulent by the biggest opponents to CPP, the FUNCINPEC and the SRP, claiming that CPP had used violence, intimidation and misuse of the electoral machinery. But for their claim to have any impact they needed evidence of massive fraud showing that CPP's actions went so far as to affect the results of the elections, something that they did not have. Moreover, the international community held that even if there was some intimidation, it was not enough to affect the polls and the elections were to be seen as free and fair.¹⁰⁷ In a hybrid regime, violations of the democratic rules have to be broad, frequent, systematic and serious enough to make the democratic institutions undependable, but at the same time not wide enough to eliminate the notion of and foundation for democracy.¹⁰⁸ A regime that is democratic to the outside but has authoritarian tendencies on the inside can get away with violations of democratic rules as long as the violations are not frequently in the spotlight of the public.¹⁰⁹ This is how CPP has gotten away with their violations; sustaining the democracy on the outside, but violating and manipulating the rules on the inside.

Levitsky and Way explain that elections, legislatures, courts and media are inherently instable institutions for it gives the opposition ways to challenge the regime and respectively gives the ruling party an intricate dilemma; they cannot completely ignore the rules for the sake of being frozen out by its society as well as the international community, nor can they let the opposition set their agenda.¹¹⁰ Therefore, in hybrid regimes, the rulers' intent is not to destroy the democratic institutions, nor are they able to do so. The tactic is to use and manipulate the rules in a more behind-the-curtains kind of way through the use of state resources, bribery, denial of media coverage and harassment of opposition, and more subtle ways of persecution such as taxes and cooperation with judiciaries and state agencies.¹¹¹ Kheang points out that CPP no longer uses violence and intimidation as a strategy to gain authority, but instead they use the elements of patronage politics, such as gifts and

¹⁰⁶ U.K Foreign & Commonwealth Office, *Country Information: Cambodia*, available at: <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/cambodia?profile=politics&pg=7> 15 September 2009

¹⁰⁷ Kheang Un, p. 207

¹⁰⁸ Levitsky and Way, p. 58

¹⁰⁹ Op.cit.

¹¹⁰ Levitsky and Way, p. 59

¹¹¹ Op.cit.

construction projects in return of favors and political support.¹¹² That way the democratic institutions can remain intact, while the CPP can remain in authority.

3.2.4 CPP's Dominance, Hun Sen and the Elections of 2008

The most recent National Assembly elections were held in 2008. The result was a clear victory for CPP, which gained more than 50% of the votes. A coalition government was created and today the CPP is teamed up with FUNCIMPEC with 90 seats respectively 2 seats in the National Assembly. Their opponents, the SRP and the Human Rights Party (HRP), got 26 respectively 3 seats. The Norodom Ranariddh Party (NRP) that is currently allied with neither the coalition nor the opposition got 3 seats, but expressed intention to ally with FUNCIMPEC.¹¹³

Elections in hybrid regimes are often coupled with international observing missions and NGOs, which is why they more often than not are conducted in a somewhat peaceful manner with the international presence limiting attempts of electoral fraud.¹¹⁴ For the second time around, the elections in Cambodia in 2008 were observed by both the European Union Election Observation Mission (EU EOM) and a delegation by the European Parliament.¹¹⁵ As explained, political violence, intimidation and harassment was earlier a big problem. The last decade has been stable comparing to its history though. During the recent elections the situation had gotten much better, but Cambodia is still a post-conflict society where political instability remains a problem.¹¹⁶ The EP delegation found that the elections were peaceful in general, but not entirely fair according to international standards.¹¹⁷ EU EOM found that there was a lack of confidence in the impartiality of the election administration.

Levitsky and Way explain that in hybrid regimes where rules get manipulated, political races between government and opposition end up being very uneven.¹¹⁸ This is evidenced by Cambodia's campaigning situation in 2008 between the CPP and the opposition, a campaign which was very uneven and the regulation for it weak.¹¹⁹ Connecting to this, EU

¹¹² Kheang Un, p. 205

¹¹³ Supra at note 105

¹¹⁴ Levitsky and Way, p. 54-55

¹¹⁵ European Parliament, Election Delegation Mission, *Parliamentary Elections in Cambodia*, p. 2 available at: http://www.europarl.europa.eu/intcoop/election_observation/missions/2004-2009/20080727cambodiareport.pdf 12 September 2009

¹¹⁶ Supra at note 115, p. 4

¹¹⁷ Ibid., p. 5

¹¹⁸ Levitsky and Way, p.59

¹¹⁹ EIU, *Country Profile 2008*, p. 8

EOM also noticed a free usage of state resources by the governing CPP, and the flow of money and gifts coming from candidates.¹²⁰

Furthermore, the EP delegation showed that the village chiefs, as in the 1998 elections, have an important role in the nation's institutional structure; they have the power to affect the voters within their respective villages. The clear majority of them being aligned with the CPP, combined with a political culture of clientelism, give a favorable situation for the CPP.¹²¹ The EP delegation concluded that the political landscape still was profoundly biased in favor of the governing party.¹²²

AHRC also signalizes the partiality of the body that is supposed to review Cambodia's electoral process and serve as an election dispute adjudicating mechanism, The National Election Committee (NEC); this election management board is dominated by the CPP, their members appointed by the CPP-dominated National Assembly, the majority of the NEC personnel CPP supporters and that the appeals against NEC judgments are heard by the CPP-majority led Constitutional Council.¹²³ And just as during the elections in 2003, the EP delegation found that the actions of CPP and the state were still inseparable.¹²⁴

CPP asserts that they bring security, stability and prosperity, claiming that they have brought economic development to the country and made infrastructural improvements.¹²⁵ At the same time, HRW show in their 2009 world report an infrastructure with widespread impunity where government officials can get away with practically anything, that corruption is raging as well as illegal plundering of natural resources.¹²⁶

Even though the CPP succeeded in drawing people to voting participation, it was not a "genuine popular political participation" that is needed to promote the democracy in a society. Moreover voting, a genuine democracy requires the people's involvement in the society through opinion-building and party partaking, something that is not encouraged through the short solutions of patronage politics – a gift for a vote.¹²⁷ Kheang holds that as long as patronage politics are spread out in a regime, the elements of liberal democracy will not be

¹²⁰ Supra at note 97, p. 3

¹²¹ Supra at note 115, p. 4

¹²² Ibid., p. 6

¹²³ Asian Human Rights Commission (AHRC), *The State of Human Rights in Cambodia 2008*, p. 2 available at: http://material.ahrchk.net/hrreport/2008/AHRC-SPR-010-2008-Cambodia_AHRR2008.pdf 20 September 2009

¹²⁴ Supra at note 121

¹²⁵ Ibid.

¹²⁶ HRW, World Report 2009, p. 230-234

¹²⁷ Kheang Un, p. 222-223

able to get a foothold in the regime. Instead it will lead to corruption and counterfeit political participation.¹²⁸

The hybrid regime in Cambodia, Kheang says, is the result of Hun Sen's leadership and CPP dominating the system, recalling that Hun Sen himself has stated that "he intends to stay in power for another decade or so".¹²⁹ Even if Hun Sen is a part of the CPP, his power extends beyond the party politics. Being the skilled leader he is, he has succeeded in building up a base of power that is no longer connected to his Party, but him as an individual with networks that go beyond the state machinery.¹³⁰ Hun Sen himself has affirmed that some of his financial resources come from donations from business tycoons. Through the CPP-owned media, Hun Sen has advertised that many of his development projects are sponsored by the donations of these businessmen. These businessmen claim that they do it for humanitarian reasons, but Kheang with many other critics argue that it is for the sake of buying themselves state influence, privileges and protection.¹³¹

Patronage politics breed corruption in the way that government officials have to keep contributing to the party purse and their superiors by giving them some of their own earnings, at the same time as they are trying to keep as much as possible for themselves. And so the whole government is full with officials that expect and are expected to do favors.¹³²

4. An Analysis of the Political Development

The political development in Cambodia has been one of ups and downs but persistently characterized by authoritarianism, something that has been recognized.¹³³ As it is showed, for the longest time, the Cambodian people have been controlled by power-hungry leaders: the French, Sihanouk, Lon Nol, Khmer Rouge and Hun Sen. Authoritarianism is defined as a political system where the power is concentrated in the hands of one leader or of a small political elite, where the government is not responsible to the people. In such a system, the people are obedient to authority which more often than not exercise power arbitrarily and

¹²⁸ Op.cit., p. 205

¹²⁹ Ibid., p. 209

¹³⁰ Ibid., p. 219

¹³¹ Ibid., p. 225-26

¹³² Ibid., p. 227

¹³³ Joakim Öjendal in Peou p. 302

disregard the established bodies of law. Needless to say, the rule of law is not the governing principle in such a society. Another characteristic is the limitation or exclusion of competition.¹³⁴ The political development in Cambodia demonstrates all of these characteristics. The people of Cambodia have not had much control in this political development, instead it has been the elitist leaders and their parties that have obtained power through different methods and kept it by violence, the threat of it or by material promises: there was the French, Sihanouk, Lon Nol, Khmer Rouge, PRK and CPP with Hun Sen as the leader. They changed the country's political ideology completely back and forth. Hence, there have been many radical changes. Seeing as the country has had a historical tradition of colonialism, one can understand that personal liberties and the rights of the people have not been strong. More accordingly, the rule of law has been weak. The frameworks of the society have traditionally been set by the leaders, and the Cambodian people have subdued to living their lives within that framework, whether they liked it or not. Through the threat of violence, they did not have a choice. This kind of historical setting made way for violent political transitions by strong leaders.

All along these previous violent political transitions, there were rules, there were elections and there were democratic values presented in the country. Nevertheless, they were not followed. And that is the corner-stone of Cambodia's political development. Even today, the country has a constitution consistent with human rights documents, international democratic standards et cetera, but these rules lay over the politics like a blanket. Underneath, tradition is still steering the political development, a tradition of corruption and patronage. This may be explained by the authoritarian character of the Cambodian system. In authoritarian systems there is usually a lack of developed ideological ideas. The focus is instead on the grip of power. The exercise of power is then rather practical and the system characterized by corruption.¹³⁵ Yes, communism was a strong ideology that scarred the country deeply, and democracy is a strong ideology as well, but the latter did not turn the country's practices around so completely as the Khmer Rouge's communism did. As has been shown, power is more prominent in the Cambodian system than democratic values. Why is this? The development will be viewed upon through three different lenses: a conservative, a socio-cultural traditional and an economic one.

¹³⁴ Authoritarianism. (2010). In *Encyclopædia Britannica*, from Encyclopædia Britannica Online: <http://www.britannica.com/EBchecked/topic/44640/authoritarianism> at April 7th 2010

¹³⁵ Authoritarianism. (2010). In *Encyclopædia Britannica*. from Encyclopædia Britannica Online available at: <http://search.eb.com.ezproxy.ub.gu.se/eb/article-9003154> 8 April 2010

4.1 A Conservative Approach

Though many would probably disagree, I dare to say that the political development with regards to the political transitions in Cambodia can be explained through the view of conservatism. According to the theory of conservatism a society is something that grows and one should let it do so step by step, instead of revolutionizing what is historically known.¹³⁶ It is up to the political parties to respond to changing circumstances.¹³⁷ According to Minogue, conservatism is not against change, it is merely a question about the source to change, i.e. where change should occur. In that view of the conservatism theory, what is necessary for change is a strong framework where societal issues can be worked out for themselves, instead of looking to regulate every step of it and especially in the complexities of legislatures and thus putting it into the hands of the legislator. Society can evolve without being dictated to change. Minogue compares this view with the maxim “hard cases make bad law” in that legislation should not cause change, but the society itself within given frameworks.¹³⁸ Thus, changes should be made within a set framework of society and not by tight legal regulations. One can see the violent political transitions, i.e. changes, as something radical, something that conservatism does not sympathize with. In that sense, conservatism appreciates and upholds identities and not change.¹³⁹ Violent power transitions might thus be something inconsistent with a step-by-step change in society. But what if that is the tradition of the society? What if that is the identity of the political system? What happens if that is the framework? These questions have lead me to apply the theory of conservatism here, since the political development in Cambodia has happened in a societal framework where violent power transitions by elitists is historically traditional.

Already established identities and habits are respected, and conserved if you so will.¹⁴⁰ Patronage and corruption have been ruling the Cambodian society for at least the past thirty years. As explained earlier, the Cambodian political system is drenched in patronage politics and corruption, upheld by the rulers. Ordinary Cambodians deal with bribes in their everyday contacts with authorities and social services. This identity of the Cambodian society is something that has been at the very least tolerated by the people. This has become their habit, their tradition. When UNTAC entered Cambodian ground and when the new democratic constitution came, it did not change Cambodia. Like conservatism says, change needs to

¹³⁶ Kenneth Minogue in Kuper p. 33

¹³⁷ Ibid. p. 34

¹³⁸ Ibid. p. 35

¹³⁹ Michael Oakshott in Bronner p. 89

¹⁴⁰ Op. Cit.

happen for itself, by the people and the parties, in a set framework. UNTAC could not do that for Cambodia, neither could a new constitution stated in a document.

However, this is as far as I will apply the theory. The theory of conservatism is in this case merely used to show that even violent political transitions can be seen as traditions and identity. Regarding values and the application of norms within the society, conservatism is obviously not fit to explain the ideological transitions. Conservatism goes against dictating change, which is something that Cambodia's political leaders have done. However, smart leaders like Hun Sen have not been known for directly and openly dictating rules and changes. Instead, his almost thirty year long rule of the country has been to use the existing institutions, creating an illusion of a democracy, but where he is ruling almost incontestably.

4.2 A Societal, Cultural and Traditional Approach

Democracy was presented in Cambodia with UNTAC, something that Öjendal refers to as the “big bang”, because of the system being too different from previous and because of the difficulties of implementing it.¹⁴¹ A problem for the Cambodian political development that one must consider is this presentation of democracy into a society that has had a completely different tradition. Etcheson, with many other voices, hold that the UN goals were too optimistic as well as UN's assessment of the situation after they left. He holds that history shows that democracy is a long process, emerging democracies in East Asia being a clear example. Certain social and economic preconditions need to be fulfilled for the sustainment of a liberal democratic system, such as a strong labor force, a strong middle class with bargaining power etc. Conditions that did not exist in Cambodia.¹⁴² UN's plan was to alter the political interactions in Cambodia, but the UN intervention could not change the habits of the Cambodian politicians, nor did it change their actions and policies into democratic ones. Instead, gaining and sustaining power was still on their mind which was demonstrated by their actions. The political situation in Cambodia did not alter completely after UN. However, it did change the direction of the political development towards a democracy, but nevertheless in instability and political violence.¹⁴³

Lizée explains that the institutional legal framework presented by the UNTAC could not have an immediate democratic effect since the organizational structure stems from the ideas

¹⁴¹ Joakim Öjendal in Peou p. 302

¹⁴² Etcheson, p. 42

¹⁴³ Etcheson, p. 4 and p. 51

of the West where it works due to the political structures permitting such a framework. This is because the resort to democratic tools and institutions are a function of the traditions and history in the West, but that is unfamiliar with the traditions in Cambodia.¹⁴⁴ He connects the development of politics and institutional frameworks with the religions of the country, Brahmanism and Theravada Buddhism. Fundamentally, these two result in societal traditions that rest on ideas that human beings have little effect over their surroundings and that the society is divided by class and rank and not by popular institutions. This gives that social interactions obviously differ in Cambodia comparing with the West, something that was not touched upon by the UN. When UNTAC then presented a liberal democratic framework, it was an institutionalization that could not be recognized by the Cambodian society. However, with the international community pressing on, the Cambodian government made concessions but this did not result in a deep societal transformation. The model could not be directly transferred to a society that lacked the institutional roots needed.¹⁴⁵ For the ideology of liberalism to rule a society there needs to be a consensus among some basic moral values, such as tolerance, progress, liberty, individualism etc.¹⁴⁶ Cambodia lacks this to this day, which is why democracy is still such an intricate issue under development.

4.3 An Economic Approach

Political development can also be tied to an economic perspective. Öjendal puts forth that the socio-economic level in Cambodia is one of the lowest in the world. Citing Sørensen, he holds that an adequate socio-economic level is required for the sustainability of democracy in a Third World Society.¹⁴⁷ Öjendal then illuminates the economic issues of the country and the linkage to democracy: underpaid military being one of them, corruption being another.¹⁴⁸

An unstable economy has been following Cambodia's development at least ever since Sihanouk's time when his policy lead to a cut off of US economic aid, nationalization of the foreign trade, losses of revenue, agricultural problems etc.¹⁴⁹ As the economy was getting worse so was his power grip getting weaker. When Lon Nol took over, there was a slight adjustment to the instability in the economy. However with the sudden US aid corrupting state officials and with the US bombings causing a lack of farmland the economy was not

¹⁴⁴ Pierre Lizée in Peou, p. 83

¹⁴⁵ Ibid. p. 84-85

¹⁴⁶ Vincent, p. 23

¹⁴⁷ Joakim Öjendal in Peou, p. 303

¹⁴⁸ Öjendal 303

¹⁴⁹ Supra at Chapter 2, p. 7

getting better. Au contraire, the poor economy and the lack of farmland was one of the reasons why the Khmer Rouge could take over.¹⁵⁰

Since the people working for the government did not have any strong ideological ties, but were being corrupted by money, their loyalty to the government was not strong. But neither was the leadership. Since the lack of farmland led to a flood of people to Phnom Penh, it made it easier for the Khmer Rouge to capture as many people as possible. Concurrently a concentration of people made way for collectivization. And when the city life was falling apart, Cambodia was taken over by Khmer Rouge.¹⁵¹ Yet again, a connection can be made to the poor economic situation in the country. Even the Khmer Rouge communist policy was tied to economic development of Cambodia through mass production of rice.¹⁵² Needless to say, the economy did not develop as they wished. Gottesman paints a picture of a ruined economy after the Khmer Rouge that goes beyond poverty: unusable land, small amounts of rice seed left for the coming harvest, slaughtered or dead cattle, agricultural tools and tractors ruined, a commercial structure in ruins, broken down vehicles, damaged roads, railroads, bridges stores etc.¹⁵³ And this picture but merely exemplifies the horrific state of the country.

After the PRK took over and patronage politics became the standard, people were joining in the party for the sake of collecting bribes and taxes.¹⁵⁴ Important to note though is that the idea of collectivization did not end with the end of the Khmer Rouge regime, it continued with PRK. But it did not last long. Gottesman puts forth that the ideological connection to collectivization was not strong and that state officials were selling off land for their own gain, a problem well known in Cambodia.¹⁵⁵ Like pointed out earlier, ideology did not seem that important to the leaders of Cambodia, with the exception of the Khmer Rouge. The PRK tried to sustain collectivization and socialism, but as Gottesman describes it – they stopped caring when their own interest shifted to the other side, towards a more open economy.¹⁵⁶ As a consequence, the political direction changed as well. Yet again, the political development had connections to the economic situation in the country.

Today patronage and corruption are more than ever engraved in the country's economy, being a part of the country's culture, CPP's tradition, a part of Hun Sen's leadership. Accordingly, the economic situation and economic incentives play a huge part in the way

¹⁵⁰ Supra at Chapter 2, p. 9

¹⁵¹ Op. cit.

¹⁵² Supra at Chapter 2, p. 11

¹⁵³ Gottesman, p. 79

¹⁵⁴ Supra at Chapter 2, p. 14.

¹⁵⁵ Gottesman, p. 272-273

¹⁵⁶ Op.cit., p. 277 and p. 280-281

Cambodia is governed. It might thus be true then, that the economy needs to get better for democracy to get a foot-hold in the society.

5. The Cambodian Legal System

5.1 The Legal System in a Hybrid Regime

A significant feature of a hybrid regime is a weak legislature and judiciary where the ruling party is influencing the laws being made and affecting the judges by bribery, extortion etc. Patronage, corruption and blackmail are, like mentioned above, typical in this kind of system.¹⁵⁷ Like the chicken and the egg, it is disputed whether it is the legal system that needs to be reformed first in order to get a change in the political system or whether it is vice versa. Fernando holds that the development of the legal system is of tremendous significance for the political development in Cambodia, since it is reasonable that the dysfunctional legal system makes the political system stay at a status quo.¹⁵⁸

5.2 Cambodia's Legal System and the Effects of Politics

Cambodia's legal system has at the very least clearly been affected by politics ever since its independence. After the country fully broke free from France in 1953, it was a French civil law tradition. Then authoritarianism and military dictatorship spread its roots in the system, to finally be completely eradicated by the Khmer Rouge. After this, the Vietnamese puppet regime PRK tried to build up the system, now with a Soviet-based influence.¹⁵⁹ The Soviet system was not one that appreciated law, and so development was slow. There was the enactment of a few laws and establishment of courts, but the legal education was least prioritized.¹⁶⁰ There has been a clash within the government between the liberals in the Ministry of Justice that want to develop the rule of law and other figures in the government that want to hinder it. Therefore, the legal system has been the weakest part of the political and economic structure. The executive's power, i.e. the prime minister, was all along the strongest, even within the legislature's branch.¹⁶¹ The current regime was a product of the

¹⁵⁷ Levitsky and Way, p. 55-56

¹⁵⁸ Fernando, p vi

¹⁵⁹ Kritzer, p. 242

¹⁶⁰ Donovan, p. 446

¹⁶¹ Op.cit., p. 447-448

UNTAC sponsored elections in 1993 after which a new constitution was promulgated, still with Soviet influences.¹⁶²

5.3 The Constitution, Rights and the Rule of Law in Cambodia

The constitution establishes a liberal democracy with a multiparty system. A system of checks and balances is supposed to make sure that there is a separation of powers between the three branches of government- the judiciary, legislature and executive. It stipulates the principle of the independence of the judiciary and puts upon them the power to review the executive.¹⁶³ The legislative branch is bicameral, and the executive is comprised by the King which is the chief of state and has no power to rule, and the prime minister which is head of government and has de facto ruling power.¹⁶⁴ The legal education is very important for the establishment of democracy and the rule of law. And even if it has been improved and a Bar Association established, it is still very much politicized and affected by corruption.¹⁶⁵

Civil rights in Cambodia are not highly respected, and The Economist reports that there are arbitrary arrests, detentions and torture.¹⁶⁶ Fernando holds that the Constitution of Cambodia is contradictory to its own legal system, which is why it is working so poorly.¹⁶⁷ Criminal investigation and the administration of criminal justice are two examples that Fernando gives on the contradiction between law and practice. The judicial police and the military police, which are Cambodia's two law enforcement agencies, formed their own practices on how to handle those procedures after 1979 and up until the ratification of the new laws in 1992. And so, even when the new acts were passed, they continued performing the procedures according to their old methods, disregarding the new rules. Fernando spells out the customary practices of the administration of criminal justice as they continued even after the enactment of the Constitution; when investigating a criminal, the legal practitioners within the different institutions collaborate to either obtain a confession from the detained or to let him go. Thus, focus is on the confession, which they try to gain in all kinds of ways, including torture.¹⁶⁸ Needless to say that torture is prohibited by the human rights documents, and ergo the Constitution by incorporation. The new acts were influenced by democratic rules based on

¹⁶² Supra at note 160.

¹⁶³ Kritzer, p. 242-243

¹⁶⁴ CIA, *World Fact Book – Cambodia*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> 20 September 2009

¹⁶⁵ Kritzer, p. 245

¹⁶⁶ EIU, *Cambodia Country Profile 2008*, p. 8

¹⁶⁷ Fernando, p. vi

¹⁶⁸ Op.cit., p. 18

fairness and human rights, while the practiced methods stem from a communist era when the legal structure was influenced by the political motivation of protecting the state against the individuals, a contradiction to today's legal structure. The whole legal culture before the enactment of the new constitution was influenced by totalitarian notions. That is why, Fernando holds, it was difficult for the legal practitioners to change their ways, literally and psychologically, and even three years after the ratification they were still following their old rules.¹⁶⁹ This report came out in 1998. However, Human Rights Watch inform that even to date, 11 years later, it is not unusual for the police to use torture to get a confession from a suspect.¹⁷⁰ AHRC as well, report that torture and ill treatment are still methods used on suspects and accused.¹⁷¹

According to Gottesman, the criminal code that Cambodia had until 1993 “was barely a legal document at all” that served to protect the state and the revolution from anyone who was against it.¹⁷² There were those within the Ministry of Justice that wanted to reform the codes. To exemplify a dispute, there was the question about whether the police should get search warrants before entering someone's house or if they could freely enter upon suspicion. The discussion about the question came to a deadlock and Hun Sen was assigned to solve it. Hun Sen was against the strict rule of law implementation that the Ministry of Justice tried to put into the legislation, and he did not like the human rights provisions that they wrote.¹⁷³ Within the Council of Ministers, there were complaints that the rigidity was in the way of quick and effective negotiations. Stating that, while a search warrant on the one hand is legally correct, it is not accustomed to the situation as it was in Cambodia in 1985 on the other. Therefore, the police acting without a search warrant was appropriate, even though not in accordance with law. But Hun Sen could not make the two opposing sides to agree on the question, nor could he write any laws. What he did instead was to create a new office within the Council of Ministers that was assigned with the task of drafting laws. And so when the draft came, the question about search warrants was removed. Remaining unregulated, the police could continue with their previous methods.¹⁷⁴ Even the general prosecutor of the Supreme Court described in a report in 1988 a lawless Cambodia where lengthy detentions,

¹⁶⁹ Fernando, p. 15

¹⁷⁰ HRW, World Report 2009, p. 233

¹⁷¹ AHRC, p. 17

¹⁷² Gottesman, p. 241

¹⁷³ Op.cit., p. 215

¹⁷⁴ Ibid., p. 247-249

arbitrary confiscations and an indifference to the justice system were raging.¹⁷⁵ At the same time there were those within the justice system that were pushing for an end to the impunity. However, the fight for legality in Cambodia is many times a question of institutional rivalry, something that could be shown by individual ministers changing their opinions as they were changing institutions, acting with “personal interests and political calculations”.¹⁷⁶

The establishment of the rule of law has hitherto not been successful in Cambodia, AHRC reports. They show that many actions of the government and especially Hun Sen have been unconstitutional. But the supervising mechanism that is the Constitutional Council is majority led by the CPP, and there is thus not much that will be done about their actions. Accordingly, they are not known to have declared any action of the government as unconstitutional.¹⁷⁷

In 1998 Fernando explained that one of the problems of the Cambodian legal system was the status of the judges and the prosecutors; they had the same status which made the whole criminal investigation process more difficult and unreliable.¹⁷⁸ Eleven years later, AHRC positions the same problem. The constitution prescribes a law that is supposed to guarantee the independence of the judges and prosecutors. Despite governmental promises, such a law has however not yet been enacted. AHRC holds that this delay is because of the de facto political control over the judiciary. Another corollary between the judiciary and politics is the legal training for judges and prosecutors with their Academy of Judicial Profession being directly placed under the Office of the Council of Ministers whose leaders are CPP members. For that reason, the judiciary cannot independently protect the Cambodian people and guarantee them their constitutionally recognized rights.¹⁷⁹

According to AHRC, the government does not respect the constitutionally required legislative process and many times makes laws through orders, an example being the “notification letter”, which is used by the Prime Minister or his office. It has no official status as a law, executive order or a regulation nor is there any parliamentary oversight or judicial review, and yet it trumps court judgments. This political interference in the judicial process is

¹⁷⁵ Ibid., p. 255

¹⁷⁶ Ibid., p. 256

¹⁷⁷ AHRC, p. 20

¹⁷⁸ Fernando, p. 15-18

¹⁷⁹ AHRC, p. 21

unconstitutional, AHRC concludes, with the consequences being an even broader power in the hands of the Prime Minister and a wide-spread corruption.¹⁸⁰

The UN Declaration of Human Rights and all other rights documents are now recognized and respected in the constitution, as well as due process of law and prohibition of retroactive laws.¹⁸¹ However in practice, human rights are not highly respected. A report from an independent UN expert declared in August this year that the human rights situation in Cambodia is worrying, the judiciary being especially troublesome. The Special Rapporteur Surya Subedi¹⁸² reported to the UN that “The rule of law is weak in the country. The judiciary is not as independent as it should be. Some of the core political rights such as the freedom of expression and peaceful assembly have been undermined”. Furthermore he highlighted the problem of impunity, but was positive about the fact that the Government now showed a willingness to engage with him about these issues.¹⁸³

Gottesman puts forth that albeit a favorable political environment; changing the ways of the judiciary, police and military takes a very long time.¹⁸⁴ Even if you can create an institution under a very short period of time, the indoctrinated actions of individuals you cannot. And so, although the legal framework now provides tools for a democratic and just system, more needs to be done. It is still very much underdeveloped, demanding more work and engagement from every branch. The executive branch, dominated by the CPP, still has the most power within the legal system and does not yet prioritize domestic legal reform. This gives a legal system that is not respected and a legal process that is many times interfered with.¹⁸⁵ The judges, with their low salaries, many times accept bribes. This gives a system where laws are being disregarded. The legislature, even if it is bicameral, is dominated by the CPP in both the National Assembly and the Senate. This gives a system where the political party can set the agenda in the legislature and steer the laws being made. The broadcast media in Cambodia is owned by the CPP, even if there are some struggles towards free press. Finally, this gives a system where information does not run freely but is controlled by the one

¹⁸⁰ Op.cit., p. 24-25

¹⁸¹ Gottesman, p. 242

¹⁸² See at note 160 “Mr. Subedi, like all Special Rapporteurs, carries out his mandate in an independent and unpaid capacity, and reports to the Geneva-based Human Rights Council.”

¹⁸³ UN News Centre, “*Basic freedoms restricted in Cambodia, UN rights expert reports*”, available at: <http://www.un.org/apps/news/story.asp?NewsID=32381&Cr=cambodia&Cr1=&Kw1=cambodia&Kw2=&Kw3> 28 October 2009

¹⁸⁴ Gottesman, p. 267

¹⁸⁵ Kritzer, p. 245

political party that has the strongest hold over the country. Ultimately this means that CPP's power has its hold of all important parts of the infrastructure and the information.¹⁸⁶

¹⁸⁶ EIU, *Country Report 2008*, p. 7

5.4 Recent Developments in Cambodia's Legal System

Since the first resolution was adopted in Cambodia in 1993 by the UN Human Rights Commission, HRW reports, the government has made very few steps on reforming the legislature and judiciary.¹⁸⁷ In 2008 there were no judicial or legal reforms. They hold that the Supreme Council of Magistracy continues to be inadequate and politicized, even though the institution is supposed to guarantee judicial independence. The Constitutional Council on the other hand, is supposed to make sure that new legislative acts are constitutional, a task in which they are failing.¹⁸⁸ The Global Integrity corruption report shows that even if review has been done by the Constitutional Council before, it is something that is rarely done.¹⁸⁹

A central incident in the downward spiral of Cambodia's human rights situation, according to many, was the resignation of the Special Representative of the UN Secretary General for Human Rights in Cambodia, Prof. Yash Ghai. This post was created after the Paris Peace Agreement so that the human rights situation in the country could continue to be closely monitored. To the Cambodian government's and Prime Minister Hun Sen's dislike, Ghai found numerous repeated human rights violations. Ghai devoted himself to honestly examine the situation by meeting officials in the government, people in the Cambodian civil society, victims of human rights violations and visiting places where violations had occurred. What he repeatedly commented on was the government's preference for the wealthy and powerful and the use of the poor, the lack of judicial independence, the executive's control over it and the power being concentrated in Hun Sen's hands and his nonchalance for human rights. Since Ghai's appointment in 2005 and up until his resignation in 2008, he had had a very hard time with Hun Sen and his government, with them disregarding his reports, attacking his personality and country, denying meetings with him and asking the UN for his leave. This finally ended with Ghai's resignation, and with his resignation also came the end of the post of the Special Envoy of the UN Secretary-General for Human Rights in Cambodia. The post is now replaced by a Special Rapporteur,¹⁹⁰ and presently held by Mr. Surya Prasad Subedi from Nepal.¹⁹¹ HRW has called for a renewed mandate for this new post, pointing to

¹⁸⁷ HRW, *Renew Mandate for the Special Rapporteur for Human Rights in Cambodia*, available at: <http://www.hrw.org/en/news/2009/09/29/renew-mandate-special-rapporteur-human-rights-cambodia> 02 October 2009

¹⁸⁸ HRW, *World Report 2009*, p. 233-234

¹⁸⁹ Global Integrity (GI), *Global Corruption Report, Scorecard: Cambodia 2008*, p. 90

¹⁹⁰ AHRC, p 7-8

¹⁹¹ Special Rapporteur for Human Rights in Cambodia, available at: <http://cambodia.ohchr.org/EN/SpecialRapporteur.htm> at 20 November 2009

the fact that since his appointment in 2008 he was only able to pay Cambodia one short visit without the ability to make a deep assessment of the human rights situation.¹⁹²

HRW stated recently in a news article that the political situation in Cambodia has gone worse. Political suppression of opposition has increased as well as political violence. Harassment, threats, violence, arbitrary arrests and detention are not unusual tactics used by government officials to suppress dissents, from whichever direction they might be coming from. HRW points to the weakness of the judiciary and their reports show that the government is corrupting the legal system by counterfeit legal action to silence opposition, such as filing unjustifiable lawsuits against critics for criminal defamation, disinformation, and related charges.¹⁹³ An example is the case of Moeung Sonn, the head of the Khmer Cultural Civilization Foundation. He suggested that a new lighting system at the Angkor Wat temple could damage the 600-year-old building, and for that he got sentenced to two years in jail in absentia for "disinformation".¹⁹⁴ "With increased suppression of opposition political parties, independent media, and civil society, Cambodia is moving closer towards becoming an authoritarian, one-party state, with few-if any- checks and balances."¹⁹⁵

Another worrying development in Cambodia is the government's plan to regulate NGOs. This kind of human rights observers have complained about the violations in Cambodia for a long while, something that has frustrated the CPP led government. Almost immediately after winning the elections and disguising in concerns about terrorists funding the NGOs, Hun Sen informed that the government would enact a new law regulating them.¹⁹⁶ AHRC explains that financial funding like that already is covered by an anti-terrorism law, holding that these concerns are hardly founded. AHRC illuminates the suspicion that what the government is doing actually might be an attempt to control the human rights NGOs activities in order to dampen criticism against them. There are already laws restricting some of the NGOs activities. AHRC holds that there is not much that could restrict the government enacting any NGO law they want because of the CPP majority in the government, the anti-NGO attitude amongst them, the weak opposition and the diminished activity of international

¹⁹² Supra at note 188.

¹⁹³ Op.cit.

¹⁹⁴ Johnston, *Cambodian Cases Intensify Concern*, available at: <http://www.ft.com/cms/s/0/e8cef65c-7a45-11de-b86f-00144feabdc0.html> October 02 2009

¹⁹⁵ Supra at note 188.

¹⁹⁶ AHRC, p. 5

organizations monitoring human rights.¹⁹⁷ With even more restricted NGOs, human rights will get even weaker, AHRC worries, since honest and impartial observations will be made difficult.

HRW holds that the past year in Cambodia has been one of human rights violations, specifically of freedoms of expression, association, and assembly.¹⁹⁸ The right to freedom of expression and assembly includes the right to hold peaceful demonstrations; this is a basic human right included in the human rights documents that Cambodia incorporated in its constitution and bound itself upon. However, in Cambodia there is a ban on peaceful public demonstrations; a ban that is forcefully enforced. An example of this is a group of Buddhist monks that were assaulted by a riot force police armed with batons and shields, when they were on their way to the Vietnamese embassy in Phnom Penh to hand in a petition for the release of fellow monks with the same indigenous origin that were in prison in Vietnam.¹⁹⁹ Even if Cambodia has a stronger press freedom than many of its neighbor countries, it was dealt a severe blow in 2008 when a journalist, suspected to be affiliated with the opposition, and his son were gunned down in broad daylight in Phnom Penh; an incident that nobody in the media business failed to notice, an incident that damaged press freedom in Cambodia as a whole. But even so, AHRC holds, media in Cambodia was not much safer or freer from government intervention before the murders.²⁰⁰

In their newest world report, HRW positions that Cambodia continued to move towards authoritarianism in 2008 as CPP and Hun Sen won the elections by means that were criticized by both the EU and UN.²⁰¹

5.5 Impunity in Cambodia's Legal System

Cambodia is a “culture of impunity”, as Etcheson refers to it. It is a society where the powerful can do what they want at the expense of the weak, without being restricted by laws and institutions. In fact, impunity is deeply institutionalized and held up by supporting laws, customs and behaviors. This is something that is acknowledged as a serious problem. While

¹⁹⁷ AHRC, p. 6

¹⁹⁸ HRW, *World Report 2009*, p. 230

¹⁹⁹ AHRC, p. 15

²⁰⁰ Op.cit., p. 14

²⁰¹ Supra at note 199.

impunity has always been of great power for Cambodian politicians, the rule of law has not. It never got a firm foothold in the Cambodian society.²⁰²

Even though reports about impunity in Cambodia keep coming out, Gottesman contains, the government keeps ignoring them while their officials, the police and the soldiers keep abusing the system without prosecution.²⁰³ The Cambodian League for the Promotion and Defense of Human Rights (LICHAHO), a Cambodian human rights NGO, reported in 2007 that impunity is one of the biggest problems in the country. It is prevalent in the everyday life of Cambodian civilians, as well as on a higher level between politicians and government officials and their relatives; it covers every area in the Cambodian institutionalism. There are wealthy or powerful people that commit crimes and then buy their way out of punishment by paying financial compensation to the victims or their families. There are a number of murders that are unsatisfactory prosecuted or not prosecuted at all, in recent years especially numerous high-profile killings of the opposition. In 1997, there was a grenade attack on a demonstration led by Sam Rainsy when at least 16 people were killed and many more wounded. According to LICHAHO, this is a clear example of the prevailing impunity in Cambodia, since no one to this day has been put to justice for it.²⁰⁴ Another example is the fight between CPP supporters and FUNCIMPEC supporters, also 1997, where approximately 100 people were killed, without anyone being prosecuted for it either.²⁰⁵

One can question who is responsible for this. The institutions' responsibilities are intertwined in an institutionalism where the cornerstones of democracy are supposed to be sharing the burden, but the actors of the institutions are instead putting the blame on each other; the courts claim that they cannot do anything without reports coming from the prosecutors and victims while the police are stepping back from responsibility claiming that they cannot do anything when victims accept compensation. In reality, they are both wrong; prosecutors are obliged to investigate all crimes that come to their attention, even without reports, as well as the police is obliged to investigate all criminal offenses since settlement outside of the courts is prohibited.²⁰⁶

²⁰² Etcheson, p. 167-170

²⁰³ Gottesman, p. 255

²⁰⁴ Cambodian League for the Promotion and Defense of Human Rights (LICHAHO), *Human Rights in Cambodia: The Charade of Justice*, p. 9-10, available at: <http://www.licadho-cambodia.org/reports/files/113LICADHOREportCharadeJustice07.pdf> 12 October 2009

²⁰⁵ Etcheson, p. 169

²⁰⁶ Op.cit.

In his third report to the General Assembly, Yash Ghai stated that the judiciary is widely controlled by the government. The judiciary as well as the prosecutors get instructions from the government on how to handle cases, regardless of evidence or law. This means that governmental officials are sheltered from the law of Cambodia, a system of impunity that also covers their family and friends, “while others are prosecuted for and convicted of offences they have not committed”. Ghai found that political cases or cases with important interests are handed over to the executive’s hands, while courts are widely used for private interests and denial of justice. In fact, Ghai reports, many times courts are used as a political tool where senior officials from the opposition might be charged for a crime without evidence, after which they may be pardoned if they reach a political deal with the government. Notice here that the government does not have the power to pardon; it lies with the King, something that is disregarded by the CPP. Examples of incidents like this are the cases of Prince Norodom Ranariddh and Sam Rainsy.²⁰⁷

The culture of impunity in Cambodia not only affects its victims and those getting away with crime, but the knowledge of it affects the way Cambodians live their everyday lives and what they think of their society. Etcheson holds that this is especially to the detriment of the Cambodian youth, whom this culture teaches that respect for law does not get you far, but that power does instead. It creates an environment where people have incentives to use each other rather than follow the rules stipulated.²⁰⁸

The problem of impunity has been especially evident in the making of the Khmer Rouge tribunal. When the Khmer Rouge took over Cambodia, they demolished all the ethical underpinnings, and along with it went the notion of morality. Therefore, Etcheson stresses, moral integrity needs to be revived in Cambodia, and this can only be done if faith in the legal system and belief in one’s rights is revived. For this to happen, the Khmer Rouge needs to answer for the crimes they committed. If they could get away with the worst crimes, then everything under will be relativized and excused, and so the cycle of impunity will go on.²⁰⁹

²⁰⁷ UN GA Doc. A/HRC/7/42 29 February 2008, p. 12 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/115/04/PDF/G0811504.pdf?OpenElement> 18 October 2009

²⁰⁸ Etcheson, p. 189-190

²⁰⁹ Op.cit., p. 170-171

5.6 Corruption in Cambodia's Legal System

Cambodia is known for its dishonest courts which are often criticized for not being independent.²¹⁰ For a long time, both the Cambodian people and the international community have expressed the need for an anti-corruption law. LICHADO shows that in 2007, the judiciary was the worst institution when it came to corruption. The new government said, when taking oath after the 2008 elections, that an anti-corruption law was one of their new priorities. AHRC holds that this is a strategic move to calm the criticism against the CPP led government. But so far, this has just been empty promises without any action. At the same time, corruption has gotten bigger, broader and spread out at any level of Cambodia's institutionalism, and a bribe is expected for any public service. Corruption in Cambodia is one of the worst in the world.²¹¹ Among the Cambodian citizens, even though bribes might be considered as morally wrong, they are nevertheless accepted as common. According to a Center for Social Development study, TI reports, people differentiate between bribes in the judicial system and bribes for everyday public service.²¹² Surveys among households as well as businesses show that the judiciary is one of the least trusted institutions. The LICHADO report indicates that the judges are mostly interested in making money and finding ways of doing that. Judges low salaries combined with a culture of patronage politics gives a system that breeds corruption.²¹³ Another reason for the wide-spread corruption is the connections between the judges and the government politicians, something that is an obvious risk for partiality. And with corruption being so wide-spread, it causes a general disrespect and distrust for the judiciary in the Cambodian society. What enhances this is the inaccessibility to laws and non-transparency of judicial opinions.²¹⁴

The promise of an anti-corruption law has not gone further than pending action. In 2005, Hun Sen had sworn to battle corruption; he promised to clear the courts from corrupt judges and re-arrest the criminals they let go. At first it seemed like this was a serious attempt; three judges, two prosecutors and two clerks from the Phnom Penh Municipal Court were imprisoned after being sentenced for bribery. They were however never arrested, nor did they attend the hearings. What is more is that two months after, they even got acquitted after a

²¹⁰ LICHADO, p. 22 & GI, p. 2

²¹¹ AHRC, p. 5 & 13

²¹² Transparency International (TI), *Country reports on judicial corruption (Part Two)*, p. 183-84

²¹³ Op.cit., p. 183

²¹⁴ Ibid., p. 185

retrial. Furthermore the judges and prosecutors that were suspended during this period were reappointed to their judicial positions.²¹⁵

6. The Extraordinary Chambers in the Courts of Cambodia

6.1 Background to the ECCC

6.1.1 Early Steps towards Accountability

The protracted evolvement of the Extraordinary Chambers in the Courts of Cambodia must be understood in the historical context of accountability.²¹⁶ When the Khmer Rouge was defeated, the need for accountability and setting a precedent to deter the Khmer Rouge from future atrocities came up. The first trial held was in absentia by the People's Revolutionary Tribunal against Pol Pot and Ieng Sary in 1979, which were found guilty of genocide and sentenced to death. The trials only lasted a few days, and the legitimacy of the sentences was not recognized due to questionable legal process and the fact that the PRK was neither nationally nor internationally accepted as the righteous government of Cambodia. On the other hand, they were also welcomed by the Cambodian society as morally and politically correct. Ciorciari points to the symbolic importance of the cases being a first step towards putting the Khmer Rouge impunity to a stop, and bringing national reconciliation on Cambodia's agenda.²¹⁷

6.1.2 Cold War Politics, Obstacles and Further Steps towards Accountability

The pursuit of accountability for the Khmer Rouge atrocities became more difficult in the ten years that came after the first trials. Cold war politics had an immense effect on the interest of bringing the Khmer Rouge to justice; the great blocs of power with their alignments of regional powers were polarized against each other. The PRK government was seen as an extended hand by the Soviet, trying to take over Indochina through Vietnam. For USA, the most important thing in foreign politics was to resist the growing strength of Soviet, which is why they joined forces with China to balance out the Soviet-bloc, something that meant an

²¹⁵ LICHADO, p. 22

²¹⁶ Ciorciari, p. 30

²¹⁷ Op.cit., p. 31-32

indirect support of the Khmer Rouge which was China's protégé. However, some countries in the US-China bloc supported the Khmer Rouge more directly with food, money and medicine. Ergo, if Khmer Rouge got stronger, Vietnam would get weaker, and they in turn would need more resources from Soviet, which would then also become weaker. And so accountability for the human rights atrocities committed by the Khmer Rouge ended up being overshadowed by politics.²¹⁸

In fact, the only ones that supported the PRK were Soviet and their allies. For this reason, the PRK never managed to get international recognition nor did they succeed in getting a seat in the UN GA. What made it even more intricate to bring the Khmer Rouge to justice was the fact that UN acknowledged the Coalition Government of Democratic Kampuchea (CGDK) as representatives for Cambodia, and they could therefore hold a seat in the General Assembly until the peace accords in 1991, blocking any chances of international accountability. Hence, the international community is very much co-responsible for the prolonged Khmer Rouge impunity, and UNs support even gave their regime a notion of legitimacy.²¹⁹ The international community was too busy with cold war politics to do anything about the two propositions that came in the 1980s to bring the Democratic Kampuchea rulers before the International Court of Justice. And so, once again the effort for accountability was ignored.²²⁰

After the Cold War ended Cambodia got even weaker, since Soviet withdrew its support from Vietnam, and Vietnam did not have the same resources to uphold the PRK. The conflict was not getting any easier within the country and there were now four fractions at war with each other. The international community focused on the Khmer Rouge's importance in the peace process and during the peace talks from 1988-1990, the support from the Khmer Rouge was seen as fundamental for the peace in Cambodia. Ergo, putting them to trial for the atrocities they had committed under their four years of ruling would have threatened the peace process.²²¹

Finally, the Paris Peace Accords were signed and UNTAC entered the stage. However, they were not given a mandate to try the Khmer Rouge; they were instead to treat the Khmer Rouge as equals to the other parties, and the focus on accountability was still in the

²¹⁸ Ibid., p. 33-34

²¹⁹ Ibid.

²²⁰ Etcheson, p. 132

²²¹ Ciorciari, p. 35

background of the political agenda. Conversely, the Khmer Rouge did not want to cooperate with the internationally supported UNTAC, and they boycotted the national elections that were, according to the UN, successful. Finally, this pitted the international community against the Khmer Rouge.

Another big step towards accountability was when the U.S. finally changed its politics against the Khmer Rouge and adopted the Cambodian Genocide Justice Act. The new US policy was to support attempts holding the Khmer Rouge cadres responsible for the atrocities committed during 1975-1979. This act ultimately led to the now famous Documentation Center of Cambodia (DC-Cam) being established, the first step being the creation of a special Office of Cambodian Genocide Investigation within the US State Department that then funded the Yale University's Cambodian Genocide Program which established an office in Cambodia that would gather evidence for a potential tribunal. And in a short period of time, DC-Cam had quickly gathered a huge amount of evidence for the Khmer Rouge atrocities.²²²

The upswing for accountability quickly came to a halt though in 1979, with King Sihanouk pardoning Ieng Sary from his sentence in 1979, due to the former deputy minister now defecting from the Khmer Rouge and acknowledging the new government. The Cambodian government had a successful campaign of carrots and sticks against Khmer Rouge followers offering rewards to those who defected and the threat of prosecution to those who did not. Again, the focus was on making the Khmer Rouge weaker and not on accountability.²²³

However, for the second time, Pol Pot was tried and sentenced to life imprisonment in 1997 for the murder of Son Sen, the Khmer Rouge's Defense Minister. And for the second time, the legality of the trial was questioned. Nevertheless, Pol Pot served his sentence in house arrest, and died in 1998 of allegedly natural causes.²²⁴

There have been efforts to try Khmer Rouge members in domestic courts ever since 1979. Focus was on low-level perpetrators of the human rights breaches during the Khmer Rouge regime. However, there are not many records about those cases and many of them are at any rate questioned as improper and procedurally irregular. Moreover, barely any ranking

²²² Op.cit., p. 37

²²³ Ibid.

²²⁴ Ibid., p. 38

perpetrators were brought before a court. And so accountability was not achieved domestically either.²²⁵

The first efforts for an international tribunal came after repeated requests for help from Yale University's CGP by Hun Sen. They drafted a law for the Cambodian government that called upon the international community to create an international tribunal for the prosecution of the perpetrators of the Khmer Rouge, adding that if gotten no help, Cambodia would establish a domestic tribunal for the leaders of the Khmer Rouge. Cambodia's Council of Ministers examined it and as the National Assembly Legislative Commission was to debate about it, the government withdrew the draft. According to Etcheson, this was because negotiations with Ieng Sary about defection had just started.²²⁶ Once again, politics came before legislation.

6.2 Negotiations for a Tribunal

The negotiations for an international tribunal started a lot thanks to initiatives made by Ambassador Thomas Hammarberg, the special representative of the secretary-general of the UN for human rights in Cambodia. In 1996 he successfully brought the question of human rights breaches in Cambodia before the UN; his proposal was to establish a truth commission for the investigation of the Khmer Rouge breaches. What lay behind the idea was the issue of impunity in Cambodia. Hammarberg held that there needed to be established a truth-telling body where the crimes against humanity could be seriously discussed on how to handle them and how to investigate them.²²⁷

The objective of a truth commission is to disseminate the truth about the Khmer Rouge, so that a true history can be created and re-told to Cambodians today and in the future.²²⁸ Like Hammaberg says: "The process for *Justice* will contribute to *Memory*."²²⁹ The purpose is thus not a verdict but the uncovering what really happened during the Khmer Rouge regime. The advantage that a truth commission offers it that both victims and perpetrators can come forth and tell their story. This offers a broader understanding of the history. For perpetrators to have

²²⁵ Etcheson, p 131

²²⁶ Op.cit., p. 135

²²⁷ Etcheson, p. 135

²²⁸ Ramji, Yaya, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 Fletcher F. World Aff. 137, Spring 2000, available at: http://www.dccam.org/Tribunal/Analysis/Reclaiming_Cambodian_History.htm 13 April 2010

²²⁹ Hammarberg in Linton, p. ii

the courage to tell their side of the story without getting prosecuted, they are usually granted some sort of amnesty in a truth commission. Something that simultaneously is a disadvantage, since it goes against the international norm of prosecuting crimes against humanity.²³⁰ On the other hand, Ramji holds that while a criminal tribunal might be most suited for prosecuting the top leaders, it does not leave room for consideration of the complexities surrounding the Khmer Rouge regime and its consequences. It is a sensitive matter since many people that were a part of the Khmer Rouge are integrated in the Cambodian society today. Lesser rank than top leaders will not be prosecuted, but should nevertheless be brought up to light. Something that a truth commission offers. For the sake of societal rehabilitation, Ramji holds a truth commission to be necessary in Cambodia.²³¹ The idea of a truth commission was however not welcomed in Cambodia, where they thought they already knew the truth.²³²

Etcheson tells us however that the idea was actually explored by the Cambodian government in 1999 when they approached officials of the South Africa's Truth and Reconciliation Commission. This was a short-lived project without any results and Etcheson puts forth that it is more likely that this was a negotiating tactic in order to go around UN's proposal of an international criminal tribunal for the prosecution of the Khmer Rouge, than a serious interest in a truth commission.²³³

After the proposal for a truth commission was denied, Hammarberg continued making efforts to bring accountability to Cambodia, and in 1997 he succeeded in convincing the co-prime ministers Hun Sen and Prince Ranariddh to formally request UN's help in establishing a judicial mechanism that would bring the Khmer Rouge leaders to justice.²³⁴

One month later, in July 1997, the coup d'état took place, something that made the UN very cautious and stalled the negotiations.²³⁵ Not until half a year later was a resolution adopted in the UN GA requesting the Secretary-General to examine Cambodia's request, which lead to the appointment of the Group of Experts the following year with the task of

²³⁰ Sok, Khavan, Documenting the Truth, The Khmer Institute 2003, available at: <http://www.khmerinstitute.org/articles/art10.html> 13 april 2010

²³¹ Ramji, Yaya, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 Fletcher F. World Aff. 137, Spring 2000, available at: http://www.dccam.org/Tribunal/Analysis/Reclaiming_Cambodian_History.htm 13 April 2010

²³² Etcheson, p. 135

²³³ Op.cit., p. 136

²³⁴ Ibid.

²³⁵ Ciorciari, p. 38

visiting Cambodia.²³⁶ Their task was to evaluate and examine the existing evidence, the nature of the crimes committed during the Khmer Rouge regime, the possibility of holding the Khmer Rouge leaders accountable and recommend the best national or international legal option to achieve that. In 1999 they reported that the Khmer Rouge had grossly violated both domestic and international law, and recommended an ad hoc international tribunal due to the corrupt nature of the Cambodian legal system and the Cambodian judges' inexperience with these kinds of questions.²³⁷ Additionally, they advised that a separate truth commission be created for lesser members of the Khmer Rouge.²³⁸

When presented with this report, Hun Sen, who was now the leader of the government, changed his stance for an international tribunal and rejected it. There are those who claim that Hun Sen and his government's request for help with bringing the Khmer Rouge to justice was a mere strategy to gain political control and military dominance. Supporting this is the his sudden change of heart after a series of events; Nuon Chea (Brother no. 2 and President of Democratic Kampuchea People's Representative Assembly) and Khieu Samphan (President of the Democratic Kampuchea State Presidium) renounced the Khmer Rouge and accepted the authority of RGC as the true government of Cambodia in 1998; Ta Mok a.k.a. "The Butcher" (the last one of the Khmer Rouge making military resistance) was captured in 1999 after which the rest of the Khmer Rouge cadres gave up and acknowledged the RGC; Kang Khev Iev a.k.a Duch (former head of Tuol Sleng prison) was also arrested in 1999. Thus, the Khmer Rouge threat was removed as was Hun Sen's need for international assistance of bringing these people to justice. Hun Sen disguised his strategy, according to scholars, using the argument of national reconciliation for not creating an ad hoc tribunal, holding that brining Khmer Rouge cadres before a court might cause panic and disrupt the peace and development in the Cambodian society.²³⁹

After Hun Sen's rejection of both an ad hoc international tribunal and a truth commission followed years of negotiations. Hun Sen now wanted domestic trials or domestic judges, but not a strictly international tribunal.²⁴⁰ He wanted to try Ta Mok in domestic courts,

²³⁶ Chronology of Establishment of the ECCC (year 1997), available at: <http://www.eccc.gov.kh/english/backgroundECCC.aspx>, 16 Oct 2009

²³⁷ Hammarberg in Linton, p. 38-39, see also Worden, in Ramji and Van Schaack, p. 171

²³⁸ Ramji, Yaya, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 Fletcher F. World Aff. 137, Spring 2000, available at: http://www.dccam.org/Tribunal/Analysis/Reclaiming_Cambodian_History.htm 13 April 2010

²³⁹ Linton, p. 52-53, *See also Ciorciari p 39-40, Etcheson p 7-8 in Justice Initiatives, The Extraordinary Chambers (A publication of the Open Society Justice Initiative, Spring 2006)*

²⁴⁰ Op. cit.

while the international community opposed it, holding that domestic standards of justice would not be able to be met without international help. The broad international interest pressed for Cambodia to keep negotiating with the international community, and some governments supported Cambodian involvement in the legal process, as long as international standards of justice could be ensured. After meeting with Senator John Kerry, Hun Sen ultimately agreed to his suggestion of a domestic court with the participation of foreign judges.²⁴¹

The subsequent negotiations were about whether the applicable law should be domestic, international or both, procedural questions about standards of justice, organizational questions and funding. Legal experts from both the UN and the Cambodian government came together in a collaboration to enable legislation on the questions at issue. However, the two sides could agree on hardly anything, making negotiations very difficult. After months of negotiations, the UN legal team presented to the Cambodian government a draft of articles on how the two sides should be governed in relation to the tribunal, stating that there must not be any substantially different alterations to the articles.²⁴²

When the ECCC Law was passed in January 2001 by Cambodia's National Assembly, many of the amendments that the UN had made in the articles of cooperation were not included. After many letters between the Cambodian government and the UN, the Cambodian stance would not budge.²⁴³ This resulted in the UN withdrawing from the negotiations in 2002, holding that the Cambodian government was not committed enough to the process and contending that there was no way to guarantee independence, impartiality and objectivity in a tribunal.²⁴⁴ Kofi Annan stated that he would not resume negotiations unless he got a clear mandate from the General Assembly, leaving it for other Member States and Cambodia to pursue the matter.²⁴⁵ The GA mandate came in the end of 2002, after those interested had held a few meetings, bringing the UN back to the table.²⁴⁶ In 2003, a modified draft agreement was signed establishing the tribunal. The Cambodian government adopted it in 2004, alongside with amendments to the 2001 ECCC law as official legislation.²⁴⁷

²⁴¹ Ciorciari, p. 40, *See also Chronology of Establishment of ECCC (year 1999) available at <http://www.eccc.gov.kh/english/backgroundECCC.aspx>* 16 October 2009

²⁴² Ciorciari, p. 41-44

²⁴³ Op.cit.

²⁴⁴ Linton, p. 55

²⁴⁵ Chronology of Establishment of ECCC (year 2002) available at: <http://www.eccc.gov.kh/english/backgroundECCC.aspx> 16 October 2009

²⁴⁶ Supra at note 229.

²⁴⁷ Ciorciari, p. 29-30 and 45

The funding started in 2005 and by April, the contributing countries had donated enough to cover the international portion required. And so, after UN declared that the requirements on their side were complied with, came the entry into force of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the period of Democratic Kampuchea.²⁴⁸

6.3 The Result of the Negotiations: the ECCC, and its Structure

The product of the negotiations is a hybrid tribunal, which means that it is a tribunal with both domestic and international elements.²⁴⁹ It is placed within the Cambodian legal system and the effect of this “mixed tribunal” structure on the substantive scope is that both domestic and international law will be used and thus both domestic and international crimes adjudicated. Since the ECCC is viewed as part of the Cambodian judicial system, the typical rule of primacy over national courts for international ad hoc tribunals does not apply like it does for the ICTY or ICTR; ergo the ECCC is not seen as being above the Cambodian courts.²⁵⁰

The tribunal may adjudicate genocide, war crimes, crimes against humanity, torture, religious persecution, homicide, destruction of cultural property and offenses against diplomatically protected people.²⁵¹ The jurisdiction is limited to only trying the Khmer Rouge’s “senior leaders” that were “most responsible for serious violations of Cambodian and international law” that were committed under their regime between April 17, 1975 and January 6, 1979. There set limit for how many defendants can be tried is five, the goal is thus to only try a small number of the most high-ranking and other powerful defendants. This is something that the Cambodian government opted for; this way the impact of the ECCC will not be too high on the Cambodian society for the sake of national reconciliation. Although, critics have pointed out that they pushed for this option because of the fact that many former Khmer Rouge cadres are now in the CPP-government, Hun Sen himself being one of them.²⁵²

The tribunal is made up by two chambers; the *Trial Chamber* and the *Supreme Court Chamber*. It is consisted by both Cambodian and international judges. The Trial Chamber has four Cambodian judges and three international, while the Supreme Court Chamber has five

²⁴⁸ Chronology of Establishment of ECCC (year 2005), available at: <http://www.eccc.gov.kh/english/backgroundECCC.aspx> 16 October 2009

²⁴⁹ Roper & Barria, p. 30

²⁵⁰ Acquaviva, in Cassese, p. 462

²⁵¹ Supra at note 229.

²⁵² Ciorciari, p. 47

Cambodian judges and four international. There is also the *Pre-Trial Chamber* with three Cambodian judges and two international.²⁵³ Thus, the Cambodian judges are always in the majority, but supermajority is required for a decision. This hinders Cambodian control over the votes and ensures that there will always be at least one international judge supporting the decision. The Cambodian Supreme Council of Magistracy has the appointment power, appointing both the Cambodian judges and the UN Secretary-General nominated ones. The prosecutorial responsibility is in accordance to the inquisitorial model, but modified and divided between two co-prosecutors, one Cambodian and one international, as well as on two Investigating Judges, also mixed. Their decisions should be in consensus, but should they ever be in conflict, it will be resolved in the pre-trial chamber with a supermajority decision and without the ability to appeal.²⁵⁴

6.4 Critiques and Potential Problems with the ECCC

Ciorciari points out that many critics see the ECCC as a defeat for international standards of justice, fairness and due process. Though the UN tried hard to maintain its position during the negotiations, critics see the outcome as a defeat to the Cambodian government. Ciorciari contends that the outcome is more along line with the Cambodian government's interests than UN's when it comes to political issues such as jurisdiction of the court, structure and personnel. The compromises made by the international community have lead to the establishment of a flawed tribunal that accentuates Cambodian interests more than anything.²⁵⁵

Former UN Secretary General Kofi Annan himself has expressed the problem of the executive in Cambodia interfering with the judiciary and the weakness of it questioning its credibility.²⁵⁶ Linton also believes that the ECCC resting on the Cambodian legal system does allow for the government to exert political influence over the tribunal.²⁵⁷

²⁵³ Cockayne, in Cassese, p. 323

²⁵⁴ Ciorciari, p. 48-49, See also Cockayne, in Cassese p. 323 and Ratner et.al., p. 352

²⁵⁵ Ibid., p 51

²⁵⁶ Ciorciari, p. 47-51

²⁵⁷ Linton (2005), p. 19

6.4.1 Political Interference and Bias

Even if ECCC is a mixed tribunal, the dominance within the structure is clearly Cambodian. One of the critiques, or rather fears, is that the CPP will therefore have power to influence the Cambodian staff, since the tribunal is under the Cambodian legal system which in turn is characterized by political interference and corruption.²⁵⁸ Critics hold that the Cambodian judiciary is very much controlled by the executive branch, and consequently Hun Sen. It is held that the ECCC decisions will be biased by politics and not justified with law. This is also why many critics hold that the ECCC is a defeat for international standards of justice.²⁵⁹ Roper and Barria hold that the tribunal is seen with suspicious eyes by all levels of the Cambodian society because of the fact that it took so many years just to establish it and that the establishment was characterized by the CPP lead government making the negotiations rather difficult.²⁶⁰

The issue of the number of defendants in the ECCC is seen as a problem per se,²⁶¹ but Hun Sen making statements about this is seen as him trying to politically interfere with the judicial process. It is well-known that Hun Sen has made public statements about not wanting more suspects being tried in the tribunal. This is something that worries and upsets many critics, which hold that he is trying to affect the Cambodian staff with his public comments. Brad Adams, the Asia director at HRW has said: "Hun Sen has no role in this court, yet he keeps trying to use his hold over its Cambodian personnel to interfere". He argues that prosecution of a few more suspects hardly can jeopardize peace in Cambodia and sees Hun Sen's statements as distrustful and as an attempt to manipulate the judicial process.²⁶² Connecting to this issue, the most senior international judge at the ECCC, Silvia Cartwright, said: "[...] Comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence are therefore to be deplored."²⁶³

Foreseeing a potential problem with political interference, the international side made sure there was a mechanism that would be able to address it, when negotiating the Agreement

²⁵⁸ Ciorciari, p. 46-47 *See also Worden, in Ramji and Van Schaack, p. 171-173*

²⁵⁹ Ibid.

²⁶⁰ Roper and Barria, p. 44

²⁶¹ See section 6.4.6

²⁶² Sokha and Corey-Boulet, "ECCC ruling risks unrest:PM", available at: <http://www.phnompenhpost.com/index.php/2009090828258/National-news/eccc-ruling-risks-unrest-pm.html> 24 October 2009

²⁶³ HRW, "Cambodia: Political Pressure Undermining Tribunal Independent, Prompt Decision Needed on Additional Prosecutions", available at: http://www.cambodiatribunal.org/images/CTM/political%20pressure%20undermining%20tribunal%2007_22_09.pdf?phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4, 25 October 2009

on the establishment of the ECCC. The mechanism that the Agreement provides for, for allegations of political interference and such, OSJI holds, is not very effective. A safeguard for “disagreements” between the prosecutors or the investigating judges is built in; however for the safeguards to work, the international senior staff needs to respond to allegations rapidly and invoke the safeguards proactively. And once invoked, the process needs to be quickly mobilized among the international staff handling these issues, since it can easily be protracted and complicated by the Cambodian staff, OSJI holds.²⁶⁴

However, judges and prosecutors are not the only ones that are provided with safeguards. Another mechanism of dealing with potential impartiality is the Pre-Trial Chamber. Regarding disqualification of judges, any party may file such applications. This is stated in the ECCC Internal Rule 34.2: “Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias”. But even so, the question of bias and partiality still exists.

The Defense of Nuon Chea made use of the aforementioned right and filed an application for disqualification of the Cambodian judge Ney Thol. They claimed that the Judge is biased because of 1) having had a position as an officer in the RCAF, 2) having made decisions in favor of the CPP and 3) being a member of the CPP central committee. “In other words, Judge Ney’s position as a serving military officer and his participation in highly questionable judicial decisions ‘would lead a reasonable observer, properly informed, to reasonably apprehend bias’ against Mr. Nuon and the Khmer Rouge in favor of the CPP”.²⁶⁵

The circumstances are such that Judge Ney remains an RCAF officer. The decisions referred to are his involvement in the convictions of Prince Ranariddh, the law maker Cheam Channy of the Sam Rainsy Party (both decisions suspected of being an attack by the CPP on the opposition) and finally the decision to keep Duch detained in over eight years. The

²⁶⁴ Open Society Justice Initiative, “Recent Developments in the Extraordinary Chambers of the Courts of Cambodia, August 2009 Update”, p. 4-6, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20090817/eccc_20090817.pdf 20 October 2009

²⁶⁵ Case No. 002/19-09-2007-ECCC/PTC (PTC, Jan. 28, 2008), “*Public decision on the Co-lawyers’ urgent application for disqualification of judge Ney Thol*” available at: http://www.eccc.gov.kh/english/cabinet/courtDoc/32/PTC_disqualification_ney_thol_C11_29_EN.pdf November 04 2009

membership in the CPP central committee was however resigned with the appointment to the ECCC.²⁶⁶

The PTC argued in accordance to the bias test in *Furundzija* and the response was as following. There is a presumption of judges' impartiality and the threshold of proving bias is set high.²⁶⁷ This is derived from judges' oath to office and the qualifications by which they are appointed. This is something that has great weight in the ECCC and is equally applied to all the judges.²⁶⁸

The PTC goes on by stating that military and personal capacity can be separated, and thus Judge Ney serves the ECCC in his personal capacity and not his military.²⁶⁹ Furthermore, the mere membership of a political party does not mean that the Judge's decisions were politically motivated or influenced. The Judge's oath of office assumes that he or she will do the work impartially, free from personal beliefs.²⁷⁰ Additionally, the PTC points to the fact that Judge Ney resigned his membership of the CPP central committee.²⁷¹ What is more, the PTC observes, is that Nuon Chea was not connected to any of the cases brought up in this application. The Chamber thus concluded that the high threshold of evidence was not reached to show that Judge Ney is acting upon instruction or is politically motivated. "There could be no such apprehension of bias by an objective observer informed of all relevant circumstances of the matters put before the Pre-Trial Chamber".²⁷²

²⁶⁶ Dearing, p. 27-30, available at:

http://www.dccam.org/Projects/Magazines/Image_Eng/pdf/4th_Quarter_2008.pdf 26 October 2009

²⁶⁷ *Prosecutor v Furundzija*, IT-95-17/1A, "Judgment", Appeals Chamber, 21 July 2000, para. 189 "[...] the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." Available at:

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=402768fc4> 14 November 2009

²⁶⁸ Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01), "*Decision on the Co-lawyers' Urgent Application for Disqualification of Judge Ney Thol*", para. 15-17, available at:

http://www.eccc.gov.kh/english/cabinet/courtDoc/32/PTC_disqualification_ney_thol_C11_29_EN.pdf 10 November 2009

²⁶⁹ Op.cit., Para. 24

²⁷⁰ Ibid., Para. 28

²⁷¹ Ibid., Para. 29

²⁷² Ibid., Para. 34

This decision has been questioned in the DC-Cam magazine *Searching For the Truth*, where the writer holds that the circumstances together makes an apprehension of objective appearance of bias reasonable.²⁷³ He finds the decision unreasonable and holds: “As it is, critics could say that the decision reached was not one based on the weight of the circumstances, but the weight of political considerations this situation invoked.” He suggests that this decision had something to do with the situation that a disqualification of the Judge might have lead to a flood of applications for disqualifications of the other Cambodian judges in the ECCC.²⁷⁴ He puts the bias issue in context with the judges also being a part of the Cambodian society, where they also might have experienced the terror of the Khmer Rouge or have had relatives that perished during their regime.²⁷⁵

On the other hand, in the case of judge Ney, an indication against bias and partiality is that Judge Ney actually recused himself from the Duch case, probably due to his involvement in the aforementioned detention of Duch, in accordance with Internal Rule 34(1) which counts different situations in which a Judge may recuse himself because of potential impartiality or bias.²⁷⁶ Ergo, bias is not a self-evident issue that, despite questionable circumstances, is easy to adjudicate.

6.4.2 Corruption

It is established that corruption and political interference affects the Cambodian judges’ decisions; being underpaid, they often take bribes for the sake of deciding in favor of private interests; being pressured by or politically tied to the executive branch, they often make decisions that the government wants to see. What makes this system easier to sustain is that every part of the legal profession is part of it, even the lawyers and prosecutors.²⁷⁷ Reporter Amanda Pike informs that Judge Nil Nonn, formerly a judge in the Battambang Court and now a judge in the ECCC Trial Chamber, admitted in an interview in 2002 of having accepted bribes. This due to his low salary and, according to her diaries, only after trials.²⁷⁸ Worden therefore holds that it is difficult to escape having Cambodian staff on the ECCC that has not

²⁷³ Supra at note 258.

²⁷⁴ Ibid., p. 29

²⁷⁵ Ibid., p. 27

²⁷⁶ Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), “Public Notification of Recusal of Judge Ney Thol”, http://www.eccc.gov.kh/english/cabinet/courtDoc/159/D99_3_20_EN.pdf 14 November 2009

²⁷⁷ Worden, in Ramji and Van Schaack, p. 19, see also supra section 5.6

²⁷⁸ Pike, “Reporter’s Diary: In Search of Justice, Chapter: Battambang, The Judge”, available at: <http://www.pbs.org/frontlineworld/stories/cambodia/diary.html> 05 November 2009

been involved in such incidents in the past.²⁷⁹ Thus, corrupt judges in the ECCC are a possibility, as well as the government having interests in the outcome; since many in the CPP government have a past with being connected to the Khmer Rouge, they would potentially have a lot to lose from disclosure about what they did.²⁸⁰

Allegations of corruption are something that the Cambodian judges in the ECCC have been accused of from the opening of the tribunal, something that has stolen focus from the trials and even lead to some donors withholding their donations for the Cambodian staff.²⁸¹ Allegations of kickbacks, i.e. Cambodian judges securing their positions at the tribunal by paying for it to government officials or paying agents for the purpose of securing them the positions at the tribunal, have been flourishing since the tribunal started its work. However, many of these allegations were made anonymously, and none were proven. They have been dismissed as unsubstantiated every time.²⁸² Before the first trial (the trial of Duch), the international judge Silvia Cartwright announced that the allegations of corruption is one of the biggest issues that the tribunal has to face. Reportedly, she called for the court to undertake needed measurements to deal with the issue.²⁸³

There have been many calls for the UN and the Cambodian government to address the question of corruption in the ECCC. AHRC and the Cambodian Center for Human Rights (CCHR) was one of those that released a joint statement saying that unless the question is addressed, corruption might end up being implicitly accepted. This would undermine the ECCC and accordingly strengthen impunity and political interference in Cambodia.²⁸⁴ And in extension, with the tribunal being within that system, perhaps affect its practices.

Another problem that has occurred after corruption allegations is the lack of a corruption reporting mechanism, something that the UN has pressed for, while the Cambodian government seemingly is not doing much about the question. This has caused more

²⁷⁹ Worden, in Ramji and Van Schaack, p. 192

²⁸⁰ Op.cit., p. 188 and 191, See also McGraw, in Öjendal and Lilja, , p 262

²⁸¹ The Associated Press, “Cambodian Tribunal Worries About Corruption”, available at: <http://www.cambodiatribunal.org/CTM/Cambodian%20Tribunal%20Worries%20about%20Corruption%209.2.08.pdf> 26 October 2009

²⁸² Barton, “Kickback claims stain the KRT”, available at: <http://www.iilj.org/courses/documents/PhnomPenhPostArticleonCourtKickbackAllegations.pdf> 27 October 2009

²⁸³ Ciorciari, p. 29

²⁸⁴ Joint Statement by the Cambodian Center for Human Rights and the Asian Human Rights Commission, AHRC-STM-090-2009, “CAMBODIA: Tolerance of corruption at the Khmer Rouge Tribunal is unacceptable”, available at: http://www.cambodiatribunal.org/images/CTM/tolerance%20of%20corruption%20at%20krouge%20trial%20unacceptable%204_17_09.pdf?phpMyAdmin=KZTGHmT45FRCAiEg7OLzXFdNJ4 25 October 2009

disagreement and distrust between the international and national side, the New York Times reports. Critics say that without a mechanism like this, it appears as if there is at least a passive support of the system.²⁸⁵

In December 2008, the Cambodian government and the UN came to the conclusion that there existed a need to strengthen the anti-corruption measures in the ECCC.²⁸⁶ The initial plan for an anti-corruption mechanism at the ECCC, presented in a Joint Statement by Deputy Prime Minister and Chairman of the Royal Government Task Force on the Khmer Rouge Trials, H.E. Sok An and the United Nations Assistant Secretary-General for Legal Affairs, Peter Taksoe-Jensen, was to have two parallel national and international mechanisms called the Ethics Monitors that would meet in frequent Joint Sessions and deal with reports of corruption. The number of staff in each mechanism would be equal as would their votes, and if no consensus could be reached on a recommended action, there would be a vote that required supermajority for a decision. The consequence of this structure would be that Cambodian staff would turn to the national mechanism while the international staff would turn to its respective mechanism.²⁸⁷

The plan was highly criticized by the OSJI the day after the Joint Statement was released, particularly for the separation into a parallel national and international mechanism. According to them, the Cambodian government holds a veto over honest investigations of corruption allegations, and the proposed plan would therefore do nothing to change this. "A system where each side handles the complaints of its own staff has already been tried and shown not to work," said James A. Goldston. Moreover, they hold, the plan is defective in that it lacks a report system for allegations of corruption coming from outside of the ECCC.²⁸⁸

Discussions about the plan went on between Sok An and Peter Taksoe-Jensen, and without an agreement yet being reached, Taksoe-Jensen released a statement in April 2009 saying that UN's belief is that for the sake of credibility, ECCC staff should be able to approach any mechanism, national or international, with reports of corruption. Recognizing

²⁸⁵ Mydans, "Corruption Allegations Affect the Khmer Rouge Trials", available at: http://www.nytimes.com/2009/04/10/world/asia/10cambo.html?_r=1 25 October 2009

²⁸⁶ Pact Cambodia, *Corruption Monitor*, Issue 19, January 2009, available at: http://www.pactcambodia.org/News/Corruption%20Monitor_Issue%2014_Jan%202009%20ENG.pdf 5 October 2009

²⁸⁷ Joint Statement of 23 February 2009 by Deputy Prime Minister and Chairman of the Royal Government Task Force on the Khmer Rouge Trials, H.E. Sok An and the United Nations Assistant Secretary-General for Legal Affairs, Peter Taksoe-Jensen, available at: http://www.eccc.gov.kh/english/cabinet/fileUpload/108/Joint_Statement_EN.pdf 26 October 2009

²⁸⁸ Hart, "Long-Awaited Agreement to Tackle Corruption at the Khmer Rouge Tribunal Contains Major Flaws", available at: http://www.cambodiatribunal.org/images/CTM/osj%20agreement%20to%20tackle%20corruption%20has%20flaws%2025_09.pdf?phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4 26 October 2009

the importance of addressing the issue, Taksoe-Jensen stated that UN will strengthen their own mechanism within the tribunal, and investigate reports of corruption, “as appropriate”, and forward all complaints to the Cambodian government.²⁸⁹ Though, without stating what appropriate is.

Finally, on 12 August 2009, a UN Press Release declared that the UN and Cambodia had reached an agreement on establishing an Independent Counsellor at the ECCC to be available to all staff with any complaints. His task will be to review any complaints about human resources management in the entire ECCC administration, including complaints about corruption, and to be empowered to address it. Contrary to the initial plan, both national and international staff will be able to come forth to the office, with the security of confidentiality. Appointed to this position is Uth Chhorn, also the head of Cambodia’s National Audit Authority (NAA).²⁹⁰ The NAA is independent by law, but has been reported to be politically influenced by the government, according to Global Integrity. The post of the Auditor General is elected by the National Assembly, in the writing moment dominated by the CPP.²⁹¹ Therefore his appointment has been questioned and critics say that the auditor general and ECCC’s independent counsellor being one and the same takes away credibility from the position.²⁹²

The US has been in the forefront brokering this agreement; a requirement for donations is the tribunal being free from corruption. The OSJI contends that even with the new agreement, more additions need to be made to fully ensure independence, impartiality and confidentiality for those coming forth with complaints etc., stressing the importance of donors pushing these issues forward. The OSJI holds that recent allegations of corruption brought by ECCC staff to the UN, which were never addressed, should be investigated by the Independent Counsellor and not left unaddressed. Like earlier, they illuminate the defect of the general public still not being able to bring concerns about corruption to the Independent Counsellor.²⁹³

²⁸⁹ Statement of Peter Taksoe-Jensen, Phnom Penh 8 April 2009, available at: <http://www.unakrt-online.org/1.pdf> 26 October 2009

²⁹⁰ United Nations and Government of Cambodia, “*Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in the Courts of Cambodia*”, Phnom Penh/New York, August 12, 2009, available at: <http://www.un.org/News/Press/docs/2009/13146.doc.htm> on 27 October 2009

²⁹¹ GI, p. 153-157

²⁹² Corey-Boulet, “*Corruption counsel’s role at ECCC unclear*”, available at: <http://www.phnompenhpost.com/index.php/2009092328510/National-news/corruption-counsels-role-at-eccc-unclear.html> 23 October 2009

²⁹³ Linton (2005), p. 19

The HRW 2009 World Report declares that political interference and corruption in the Cambodian staff in the tribunal is still a serious concern.²⁹⁴ And so, corruption still seems to be a very much urgent issue that needs to be resolved for the sake of the tribunal's credibility, independence and legitimacy.

6.4.3 The Cambodian Staff

Cassese holds that one of the rationales behind international judges being better suited for international tribunals is because they are chosen on the basis of their competence in the international law area while national judges are accustomed to 'ordinary' crimes such as murder, theft, assault etc.²⁹⁵ Chandler points to the inexperience of the Cambodian judges to deal with these kinds of questions. Some international observers contended that the tribunal is not able to be independent because of the possibility of Hun Sen interfering and giving the Cambodian judges' instructions on how to deal with the cases.²⁹⁶ At the same time, Ratner et al. holds that one of the biggest problems that the Cambodian judiciary carries is the lack of qualified legal profession.²⁹⁷ It is still suffering from having lost almost its entire legal profession in the mass murders committed by the Khmer Rouge.

6.4.4 Cambodian Laws

It is asserted that Cambodian laws are not in a strong enough state of being the primary base of the tribunal's jurisdiction and procedure,²⁹⁸ and it is questioned if the Cambodian legal system has the strength to carry this extra burden.²⁹⁹ Ratner et al. asserts that the Cambodian legal system has not met any of the standards for a free and fair judiciary ever since the Cambodian civil war.³⁰⁰

Moreover, the problem that arose during the negotiations regarding the UN Agreement not being coherent with the articles preceding the 2001 EC law was harmonized to some extent, however many inconsistencies still exist between the two. Since many procedural rules

²⁹⁴ HRW World Report 2009, p. 233

²⁹⁵ Cassese, p. 127

²⁹⁶ Chandler, p. 296, *see also* Worden, in *Ramji and Van Schaack* 171-173 & 188

²⁹⁷ Ratner et. al., p. 346-347

²⁹⁸ Worden, in *Ramji and Van Schaack*, p. 171-173

²⁹⁹ Roper and Barria, p. 42

³⁰⁰ Ratner et al. p. 346

are contradictory in Cambodian laws,³⁰¹ and many inconsistencies are left unresolved or gaps left untouched between the UN Agreement, 2001 ECCC law and Cambodian law, the ECCC adopted internal rules that would fill out the gaps and resolve the uncertainties.³⁰² But there are still many issues that are unclear.³⁰³ This means that if in conflict, the judges will have to decide which law will take precedence.³⁰⁴

6.4.5 The Culture of Impunity and Lack of Trust

The biggest problem in Cambodia is, according to Ratner et al., the lack of a culture that respects and believes in the judiciary to be impartial and fair. Simply put, people do not believe in the justice system.³⁰⁵ And since the Cambodians have a lack of faith for the Cambodian judiciary, because of the pervasive corruption, their faith in the ECCC is not overly enthusiastic.³⁰⁶

The culture of impunity also produces a lack of faith towards the government, since many times they are the ones on the other end of the corrupt judiciary. McGraw stresses that many Cambodians do not trust their government and would have preferred a completely international tribunal. But, according to a number of surveys, she summarizes, most Cambodians prefer at least this international contribution in the tribunal than none at all, because they want to know the truth about why the atrocities were committed and by whom, and they do not believe that their government can give them that.³⁰⁷ The atrocities made by the Khmer Rouge have been largely repressed in Cambodia, for the sake of mixed interests; the government wanting to close the topic because of national reconciliation and the fact that many officials were tied to the DK regime; survivors wanting to move on and leave it in the past.³⁰⁸ However, Cambodians want to know the truth now.

³⁰¹ Worden, in Ramji and Van Schaack, p. 194-195

³⁰² See Preamble of the Internal Rules (Rev 4), available at:

<http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv4-EN.pdf> on 22 October 2009

³⁰³ McGraw, in Öjendal and Lilja, p. 257

³⁰⁴ Worden, in Ramji and Van Schaack, p. 173-174

³⁰⁵ Ratner et. al., p. 346-47

³⁰⁶ Worden, in Ramji and Van Schaack, p. 192

³⁰⁷ McGraw, in Öjendal and Lilja, p. 265, *See also Ciorciari p. 189*

³⁰⁸ PoKempner, in Justice Initiatives, p. 32

6.4.6 The Number of Defendants

A potential problem in the future is the question of how many defendants is enough. The agreement says “[...] senior leaders of Democratic Kampuchea and those who were most responsible [...]”. The wording thus leaves it open for interpretation if it is only the senior leaders or *also* those most responsible.³⁰⁹ If it is the latter, then that would presumably increase the number of defendants, something that Hun Sen already has expressed much dislike over.³¹⁰ The Group of Experts were of the opinion that all those “most responsible” should be prosecuted, and the UN showed this intent as well during the negotiations. Conversely, the Cambodian government was of the opposite opinion and only wanted “senior leaders” to be tried plus Duch (Kaing Guek Eav). But Duch was not a “senior leader”, nor was he high ranking in the Khmer Rouge regime. He was on the other hand the commander of the infamous S-21³¹¹ detention center (also known as the Tuol Sleng prison). And so, even if the Cambodian government wanted Duch to be tried, that decision to try him has to be supported by something; it has to be supported by the agreement. And thus, what supports the broader interpretation of the agreement is that Duch is actually the first defendant to be tried at the ECCC.

Nevertheless, it seems that the UN and the Cambodian government have come to the conclusion to only try five to ten people. Something that the critics, the Cambodian people and even former King Sihanouk are not satisfied with. At the same time some people believe that if not restrained to only senior leaders and those most responsible, perpetrators will surely be found at all levels of society and in enormous numbers, shaking the peace and stability in the country, something that would also challenge the tribunal’s limited resources. The exact scope of the agreement’s wording is however up to the prosecutors and the ECCC to decide.³¹²

The controversy in this issue is reflected by disagreement between the two co-prosecutors in the ECCC, BBC News reports; earlier this year the former international co-prosecutor Robert Petit wanted to prosecute six more suspects, while the Cambodian co-prosecutor Chea Leang rejected prosecution of more suspects with the stance of not wanting to jeopardize Cambodia’s stability, rejecting the accusations of being under political

³⁰⁹ Worden, in Ramji and Van Schaack, p. 178-180

³¹⁰ See supra section 6.4.1 para. 2

³¹¹ More than 15 000 prisoners were executed in this prison, or died from torture and/or poor detention conditions. See Case info about Duch, available at:

http://www.eccc.gov.kh/english/cabinet/files/Case_Info_DUCH_EN.pdf 22 October 2009

³¹² Worden, in Ramji and Van Schaack, p. 179-180, Ciorciari, p. 143 and Roper & Barria, p. 42

influence.³¹³ This prosecutorial disagreement went to the Pre-Trial Chamber where it was decided that the International Co-prosecutor's three submissions are forwarded to the Co-Investigating Judges to open judicial investigations.³¹⁴ This was something that was highly unwelcomed by Hun Sen, claiming that it is a threat to Cambodia's peace. After this statement, Knut Rosandhaug, Coordinator of the United Nations Assistance to the Khmer Rouge trials declared that the ECCC is independent from the Cambodian government and do not need the executive branch's approval for their decisions.³¹⁵ Nevertheless, Cambodian judges are being appointed by Cambodian officials and this issue might as well reoccur in the future.

6.4.7 The Appointment Mechanism

Like aforementioned, The Supreme Council of Magistracy (SCM) is the body that appoints national judges. For the international judges, nominations are first made by the UN and appointment is then made in the SCM. The procedure for the appointment is the same as for the national judges, as stated in the Law establishing the ECCC. However, this procedure is a criticized one. Global integrity states that the national selection procedure lacks transparency and has been accused of being un-lawful.³¹⁶ Officials from ECCC's administration office have stated that among the SCM's mandatory criteria when appointing Cambodian judges are the requirements of no political influence, pressures direct or indirect or criminal records.³¹⁷ However, in the report made by Global Integrity it is held that also this criterion is unclear, and that appointment of Cambodian judges many times is lead by political consideration.

Independent by law both from the judiciary and government, with the power of appointment and the power of oversight of the judiciary, the SCM's practice is contrary to that it has been said. "No, the SCM is not protected by political interference",³¹⁸ nor is it completely separated from politics; with the Minister of Justice being one of the members in

³¹³ De Launey, "The Trials of Pursuing the Khmer Rouge", available at: <http://news.bbc.co.uk/2/hi/asia-pacific/7970881.stm> 25 October 2009

³¹⁴ See Disagreement no. 001/18-11-2008-ECCC/PTC, available at: http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_%28English%29.pdf 25 October 2009

³¹⁵ Ciorciari, p. 48-49, See also Cockayne, in Cassese p. 323 and Ratner et.al., p. 352

³¹⁶ GI, p. 99-103

³¹⁷ Kvasager and Thul, "ECCC Reports Progress; Mum On Criticism", available at: http://www.genocidewatch.org/images/Cambodia_11_May_06_ECCC_Reports_Progress_Mum_On_Criticism.pdf 25 October 2009

³¹⁸ GI, p. 103

the SCM and the budget for SCM being integrated into the budget of the Ministry of Justice, political influence is ensured to at least some degree since he is also a member of the executive branch. And consequently, the SCM being the appointing body for the tribunal, Cambodian political influence is also ensured in the tribunal.³¹⁹

6.4.8 The Pre Trial Chamber as a Dispute Resolution Mechanism

The Pre-Trial Chamber is supposed to dissolve disagreements between the co-prosecutors and co-investigating judges and that is, according to Worden, highly unorthodox since judges will then have a saying in the prosecutorial process, something that is not their area of competence and thus decreasing the judicial independence. Furthermore, it is not defined what disagreement means, i.e. whether it is any disagreement in the prosecutorial process or just the decision to indict or not. This politically charges the ECCC even more.³²⁰ Consequently, it has been feared that some questions will be resolved this way in the PTC that is not for those judges to make, i.e. the question on how many defendants the ECCC might prosecute, as shown above.³²¹

6.5 Hopes and Expectations for the ECCC

For those who suffered under the Khmer Rouge regime, the justice of the tribunal will most likely be psychologically healing. And if, finally, accountability for the Khmer Rouge becomes a product of the tribunal, then that might restore the belief in societal norms and the legal system and thus challenge and reverse the culture of non-respect for the rule of law.³²² Ciorciari points to a DC-Cam survey that showed that many Cambodians find the moral condemnation of the past and the deterrent effect for the future to be very important.³²³

The ECCC might also bring improvements to the Cambodian legal system, strengthen the rule of law and establish the notion that nobody is above the law, not even political leaders. The ECCC staff was trained and educated before the ECCC started operating. These judges will later on go back to their domestic courts and hopefully use this knowledge there, and break free from their habits and old practices. Especially because of the extensive media

³¹⁹ Worden, in Ramji and Van Schaack, p. 194

³²⁰ Op.cit., p. 175-176

³²¹ Supra section 6.4.6

³²² Ciorciari, p. 137

³²³ Op.cit., p. 150

coverage that the tribunal has gotten, and the world following the evolvement, there is a belief that the judiciary will conform to the international standards of justice. And if the tribunal is carried out in accordance to these standards, the national courts will have an example to follow that lies within their own system, which might help establishment the rule of law and restore people's belief in the judiciary.³²⁴

It is established that Cambodians do not trust their judiciary and would have preferably seen an entirely international tribunal. However, Ciorciari stresses the fact that a survey conducted in 2004 showed that the majority would rather have trials conducted with the risk of possibly being in accordance to lower standards of justice than no trials at all.³²⁵ Dr. Gregory H. Stanton defends the tribunal and holds that the approach to the ECCC should not be all-or-nothing, and that focusing on the details and expecting perfection could only lead to more negotiations, stall and hinder the prosecutions and ultimately be in the way of justice.³²⁶ Ciorciari is also positive to the tribunal, stating that the leaders of the DK regime are getting old, and for those advocating for the tribunal, it is more important to prosecute the suspects with perhaps an imperfect trial, then to not prosecute them at all because of perfect ideals and see justice never being served.³²⁷

If there was no tribunal, it would be a setback for international law as well as the UN, letting the Khmer Rouge perpetrators get away unpunished, leaving the victims without justice, making the notion of impunity even stronger as well as hindering Cambodia's efforts to put the Khmer Rouge in the past.³²⁸

7. An Analysis of the Legal Development and its effect on the ECCC

As it has been put forth in this paper, the political environment in which the Cambodian legal system exists affects the practice of the rules. This is connected to the country's turbulent history: the political struggles for power before the KR-era, the KR-era eradicating all existing rules and societal norms, and the post KR-era with the struggle for stabilization, the

³²⁴ Ibid., p 148-152

³²⁵ Ibid., p. 153

³²⁶ Stanton, "Perfection is the Enemy of Justice, A Response to Amnesty International's Critique of the Draft Agreement Between the U.N. and Cambodia", available at: <http://www.genocidewatch.org/images/AboutGenPerfectionIsTheEnemyofJustice.pdf> 25 October 2009

³²⁷ Gl, p. 99-103

³²⁸ Ciorciari, p. 53

international involvement in national politics and thereby the implementation of values foreign to local practices. What impact this might have on the ECCC and in turn its practices is here analyzed through the international, social and legal lens.

Cambodia is a hybrid regime with democratic values in tandem with traditional practices, including a mixed tribunal with both national and international features intertwined in its system. The public, NGOs, transnational networks and the ECCC's objectives of justice have had and still have great importance in this system. Furthermore, Cambodia was not a mature democracy when its cooperation with the UN started, nor has it reached that level of practice today. Nevertheless, the democratic framework was placed within this system which did not have a tradition of democracy or a strong rule of law. UNTAC was a result of negotiations with the international community, as was the ECCC. Thus, the legal development in Cambodia and the establishment of the ECCC has traditional, cultural, political, international and societal connotations that need to be observed and taken into account when analyzing this development.

UNTAC and ECCC came into being thanks to international actors together with the Cambodian government, for that reason I apply the international relations constructivist theory. The norms and ideas that were presented to the Cambodian society did not coincide with the Cambodians' previous culture, tradition and identity, therefore I apply the social constructivist theory. The legal culture in Cambodia has since then nevertheless been changed, or at the very least affected, by the social change that was introduced with the new norms presented by the UNTAC and recently by the ECCC, for this reason I will apply sociology of law.

7.1 An International Relations Constructivist Approach

The focal point in constructivism is ideas and values. It is a social theory that explains norms and ideas changing through intellectual promoters' active persuasion and ultimately by human choices. These entrepreneurs are usually powerful individuals, NGOs and transnational activist networks.³²⁹ An example of a transnational activist network is Human Rights Watch. Their work is done by gathering information about violations of accepted legal or moral norms that have support in the international community, and then pressing governments to remedy these deviations. Their biggest power is that information-sharing tool about these

³²⁹ Mingst and Snyder, p. 9-10

violations.³³⁰ Information causes the international community to react at the same time as it informs about international standards in any given society where these norms are violated. Through their persuasion of democratic and fair values and naming and shaming of other, new collective meanings are then constructed. This in turn shapes the state system which then structures and organizes our actions, be that positive or negative.³³¹ The democracy in Cambodia was presented by UNTAC and the ECCC is a product of negotiations between the UN and the Cambodian government. To this extent, social constructivism of international relations applies to explain this development since this theory's starting-point is the relations between one state and other actors outside of the state, and how norms and ideas turn into practices and consequently shape the identity of a state; it explains here how democratic values can be introduced to a society and what it takes for the actors on different levels such as politicians and the people to internalize these norms and through their actions transform it into accepted practice.³³² Wendt holds that all theories of international relations are based on social theories of the relationship between agency, process and social structure.³³³

Wendt holds that some situations are new to our experience, which leads us to construct their meaning *de novo*,³³⁴ as could be seen after the KR-era when Cambodia had to build up its society from scratch. Wendt puts forth that consensus about identity commitments is the first stage in transformation.³³⁵ When the Peace Accords took place in 1989, one can say that Cambodia needed an international transformation. Years of human rights atrocities had gone by without adjudication of them. Many NGOs were highlighting this issue, as well did the country itself. The warring factions, together with the traumatized public, wanted to separate KR from themselves and the governance of Cambodia. Corruption and patronage politics were raging and one can discuss if the people felt the notion of justice in their everyday lives. In addition, KR had under their era made sure that the country was cut off from the international world, and restoring this during the Vietnam War and Cold war politics was difficult. But as time went by, Cambodia's government saw the importance of international integration and together with the international community pushing for international norms and values on the government, a consensus was reached on a peace

³³⁰ Ibid., p. 10

³³¹ Ibid., p. 11 and Wendt in Mingst and Snyder, p. 95

³³² Snyder, p. 4-11

³³³ Wendt in Mingst and Snyder, p. 109

³³⁴ Op.cit., p. 95

³³⁵ Ibid., p. 107

between the warring factions and a new democratic system: the framework presented by UNTAC.

The second stage, Wendt states, is a “critical examination of old ideas about self and other and, by extension, of the structures of interaction by which the ideas have been sustained”.³³⁶ Applying this to the Cambodian system, one can see that it has been sustained by patron-client relationships, corruption and political violence, something that made the institutions rather dysfunctional and unfair, the electoral system being a clear example as was shown earlier. Those who had connections and money could so bypass the rules of law. If one wanted to get things done, this was the way to do it. And so, even in citizens’ everyday lives, this was the way to get things done. Money and power trumped the rules of law. This in turn sustained the system. Thus, critiquing the ideas that sustained this structure and comparing to other lead to the formation of a new democratic system. Much thanks to transnational networks and UN, this critique could be presented and pushed forward into action.

However, ever since UNTAC left, Cambodia’s governance has been one of “hybridity”: at the same time as its patronage politics and corrupt legal system has given its rulers power, so has the somewhat newly constituted democratic institutions. This dual existence can be said to be two identities. This leads us to stage three; Wendt declares that the final and third stage in international transformation requires practice. This is the “core of constructivist resolutions of the agent-structure problem”.³³⁷ “In order to change the self, then, it is often necessary to change the identities and interests of the others that help sustain those systems of interaction”.³³⁸ Seeing as the Cambodian government was the transformative agent together with the UN, at the same time as it was the sustaining agent of the traditional norms, the issue of identity becomes intricate. Simultaneously as the Cambodian government was working for new ideas and implementing them in the Cambodian society, they were also sustaining the old ones; seemingly, new democratic ideas were developed parallel with the notion of patronage and corruption still being valuable for the governing body. And so, the Cambodian government and its society can be said to have (at least) two identities, whereof the traditional needs to change in order to internalize the democratic norms. For the new democratic identity in Cambodia to become effective, actors thus need to change their ways. Identities and interests hold a key role in the theory of constructivism. A state may have

³³⁶ Ibid., p. 108

³³⁷ Ibid., p. 103

³³⁸ Supra at note 331.

numerous identities linked to its institutional roles. Which identity will take precedence depends on how others see the state and how the state sees itself. And how the state sees itself depends on which interests it has.³³⁹ Does the Cambodian government subsequently have an interest in ceasing the practices of the traditional structure? This is weighed against the interest of getting international recognition of being democratic and fair and the benefits that come with it. As an example, more and more industrial countries demand at least some level of democracy and respect for human rights when it comes to trading.³⁴⁰ In cases where the disregard of these was high, even economic sanctions were imposed, such as the UN financial and trade embargo against Iraq after its invasion of Kuwait.³⁴¹ That being an extreme example, the trend in today's international community is a demand for respect for these values. In the case of Cambodia, corruption makes international trade more difficult since it introduces the issue of trust and suspicion. Thus, recognition as a democratic state would make relations with other actors outside of the Cambodian state easier.

7.2 A Social Constructivist Approach

The social world is a dynamic reality, influenced and changed by human thoughts and ideas. Accordingly, any given society does not exist in a vacuum; it is not a static phenomenon free from internal and external influence. A society *is* because of its people, its politics, its economics and the structures they make up.³⁴² Everything in our human societies is also made by us, be that relationships or political structures. The driving force behind all kinds of relations is thoughts and ideas. Because of the fact that we create our world, we can also understand our world. "The social world is a world of human consciousness", Jackson holds.³⁴³ Hence, laws, norms and structures are not something carved in stone; they are constantly interpreted through people's choices and thus constructed through social dynamic processes. Reality is then a social construction.³⁴⁴

In order to change the identity of impunity, corruption and patronage in Cambodia, the practices of the aforementioned need to end. In order for the democratic norms to get a foothold in the Cambodian society, actors need to start acting upon them. However,

³³⁹ Wendt, in Mingst and Snyder, p. 95

³⁴⁰ Moberg, *Villkorsklausuler: om avtalsklausuler som utrikespolitiskt instrument* (my translation)

³⁴¹ Global Policy Forum, "Sanctions Against Iraq", available at: <http://www.globalpolicy.org/iraq/previous-issues-and-debate-on-iraq/sanctions-against-iraq.html> 25 November 2009

³⁴² Jackson, p. 164-165

³⁴³ Op.cit.

³⁴⁴ Ibid., p. 165-166

interactions must be regular enough for them to become a new practice and a new identity. Politicians, the judiciary and the people are all actors that constitute their own society over and over again. Accordingly, all actors in a society are important and involved when it comes to change. Not to forget, change needs to be desired.

In Cambodia, there seems to be an internal interest to keep the traditional system alive, given that it strengthens the leaders' power grip and ensures a continuation of it. The CPP's political history demonstrates this well. Hun Sen's position as a leader of the country has not always been constituted in a democratic manner, the elections of 1993 being an example of that where the CPP was the runner up, but still refused to give its power up. Another matter that one notices is the importance of the patrons providing financial support for the country's development. Like aforementioned, Hun Sen has affirmed that he gets donations for e.g. the building of new schools and new roads. Allegedly, this is returned with political favors. My research shows that much of the country's governance is done this way, through patronage and corruption. Hence, there are still interactions between the government and the rich and powerful that help sustain this traditional system. Simply put, there lays an interest in not changing it.

Simultaneously however, the Cambodian people have expressed discontent with this system, even if they many times have to conform to the circumstances that govern their country. People might believe one thing, but have no choice but to conform to the ideas offered in their society, such as correct themselves in accordance with the decisions made by the judiciary or vote for CPP, when faced with the threat of violence. Such interactions are a part of socialization; the people do not exist in a vacuum. The people follow the identity of their culture, their history. Like showed earlier, the Cambodian people have both a religion and history of subordinating themselves to the leaders of their country.³⁴⁵ Their identities create structures that produce institutions. The institutions are usually expounded in formal rules or norms. However, institutions cannot exist without actors' knowledge of them; they exist because there are ideas behind them.³⁴⁶ But institutions are not empty shells or mere cognition. They are an internalization of ideas and socialization. In other words, both thought and practice is needed to constitute an identity of a functional institution.³⁴⁷

³⁴⁵ See section 4.2 para. 2

³⁴⁶ Jackson, p. 166

³⁴⁷ Op.cit.

In Cambodia's case, it has been showed that the judiciary is working along the line of the Cambodian government and their ideas. Accordingly, democratic ideas might be expressed in a document such as the constitution, but this shows that words are not enough for action when political power and direction of action plays a bigger role. Even though the judiciary is supposed to be impartial, it will not become that just by the mere words in the constitution. If the political power does not allow for impartiality, at least internally and behind the curtains, this will not happen. This is because the legal system in Cambodia is very much controlled by the government. The judiciary, being dependent on the government, will then sustain this identity and keep the traditional norms alive, albeit supposedly democratic. This is much thanks to the fact that the democratic system which was introduced and the constitution that followed as a product of it, was presented by the outside world. And so, with the guidance of aftermath one can see that the Cambodian government was not truly willing to adjust to it. Nor was it capable of it. Nevertheless, it set the wheels of change in motion.

Eventually change brought about the ECCC with which the notion of impunity of the Khmer Rouge was partially reduced. One must understand that the ECCC is an institution that has extensive work and ideas behind it from the Cambodian government as well as powerful intellectuals, NGOs and transnational activist networks. It is also an institution that has just recently begun its practices.³⁴⁸ But the question is if the ideas and values are adequately internalized. Allegations of corruption and political interference suggest that they might not be, blurring the identity of being a democratic and fair institution. On the other hand, no such case of corruption and political interference has to date been proven in the ECCC. Instead, what is visual is the ECCC working hard on reaffirming the values behind the institution as well as NGOs and networks actively working on holding the Cambodian government responsible for the ideas that they have committed themselves to, both in their constitution as well as the ECCC. Additionally, the work in the Chambers that has been done so far has been in accordance with the rules stipulated for the institution. Accordingly, the decisions made in the ECCC are not necessarily unfair. But, an identity cannot exist in an institutional void. External perception is equally important, for it is reproducing.

The precarious feature about ECCC is that it has its own identity at the same time as it is a part of Cambodia's system's identity, being an integrated part of it. And so, even if the

³⁴⁸ As of year 2009

tribunal's establishment was guided by international values and might have a relatively stable identity of international standards of justice, the Cambodian government does not. Because these identities are intertwined in a bigger picture of the Cambodian system, perception of it affects the tribunal as well. The international community does not see Cambodia as an entirely democratic state yet, and neither does its people. Au contraire, Cambodia's system as well as its judiciary is seen as corrupt and politically influenced. Given that Cambodian judges sit in the ECCC, these perceptions follow them into the tribunal where this identity is reproduced. Consequently, this affects the practices of the ECCC being within the Cambodian legal system, which on the one hand have to deal with the surrounding world's disbeliefs and on the other hand have to deal with potentially having corruption within the Chambers.

Nevertheless, the ECCC is a mixed court, with international judges and staff as well, and thereby actors that internalize and socialize the international standards of justice too, creating an identity of fairness. And as much as the ECCC is affected by Cambodian traditional values, it is equally, if not more, affected by international values. It has the international community watching over its practices, it has NGOs and transnational networks informing of deviations from accepted norms, and consequently it has the benefit of being in the spotlight. One should not underestimate the power of "naming and shaming". This makes it likely that the ECCC might be able to change the traditional norms in Cambodia, since its judges will go back to their national judiciary and hopefully continue the practices of the international standards of justice.

Ultimately, the persuasion of ideas in the ECCC come from both national and international directions, with the benefit actually being the Court's mixed character having the UN watching over it, as well as the rest of the world.

7.3 A Sociology of Law Approach

The sociology of law cannot be explained with one objective definition since there are a vast number of scholars using various definitions. However, Griffiths explains it well when he says "Sociology of law is the empirical social science whose object is social control".³⁴⁹ Naturally, some common ground is also to be found: When talking about sociology of law, Friedman holds, one cannot be serious without taking into consideration social, cultural,

³⁴⁹ John Griffiths in Freeman, p. 64

economic and political influences.³⁵⁰ Friedman's theory is that the society has a powerful influence on the legal system and forms it in accordance with its own societal factors.³⁵¹ He puts it very well when he says that the rules and norms in a society's legal order do not say anything about the effects of them in the society. For this, one needs to look into the larger society to trace eventual effects.³⁵² Thus, to see if the norms in Cambodia's constitution affect the legal system, one must look at the legal practices and what is upholding them. Likewise, one must look at the practices of the ECCC to see if the norms and ideas behind it are being internalized as stated prior to the opening of the tribunal. In conclusion, reality is socially constructed.³⁵³ Consequently, when applying this science, one focuses on social control, influences, effects and changes.

When Ehrlich speaks about law and the proliferation of it, he contends that there is no such thing as a state law existing merely through a regulation. A law exists because the state has created institutions through which enforcement is made possible because of the state's power of compulsion.³⁵⁴ Similar to this, Habermas concludes that the existence of individual rights depends on the rights being concretely delineated and shaped in terms of basic rights that are connected to an independent judiciary where the judges will make their decisions on impartial grounds. He thus presupposes that the power to decide stems from the sanctioning power of the state and its organizational capacity.³⁵⁵ As a result, he connects the function of law to political power: it is because of political power that decisions are binding.³⁵⁶

Applied to Cambodia, the country has indeed delineated rights stated in terms of a constitution, basic rights, human rights, all rights needed in a democratic society. However, the judiciary is not impartial. But this impartiality is not independent of the state, even the impartiality is thus derived from the sanctioning power of the state, seeing as the judges many times make their decisions in accordance with political direction and orders, political bias and corruption. And so, regardless of what rights are stated in legal documents, their implementation will be done by biased judges. Thus, using Ehrlich's definition, the law does indeed exist because of the state's power to compel. However, using Habermas definition, it is

³⁵⁰ Lawrence M. Friedman in Freeman, p. 185

³⁵¹ Op.cit., p. 186

³⁵² Ibid., p. 187

³⁵³ Freeman, p. 1

³⁵⁴ Ehrlich, p. 136

³⁵⁵ Habermas, p. 133-134

³⁵⁶ Op.cit., p. 133

questionable if one can say that there exists such a thing as individual rights in Cambodia seeing as the impartiality condition does not exist in practice.

On the other hand, ECCC must be differentiated from the Cambodian judiciary, even if the tribunal lies within its system. This is because there lays an enormous political pressure behind the ECCC, both on the national and international level. The government has to show its people that it is willing to put those most responsible for the KR atrocities behind bars at the same time as the international world is observing the ECCC practices, with an obvious interest in keeping the tribunal neutral and fair seeing as it is partially representative of the UN given the international judges in it. Moreover it is evident that the international community wants to see people prosecuted for the crimes against humanity in accordance with international norms, as well as the Cambodian people are crying out for truth and justice. The establishment of the ECCC was made through lengthy reciprocal interactions between the Cambodian government and the international community. The discussions around it all concerned democratic values and international standards of justice. The practices of the ECCC are according to the law establishing it, democratic and fair. And even with the allegations of corruption circling the ECCC, the push for democratic ideas and fair norms has been constant. One can then say that interactions connected to this have undoubtedly been regular and high. This establishes a political power which then makes sure that the enforcement mechanism in the ECCC has bearing and gives the ideas, norms and rules creating the ECCC force and makes sure that they are not merely words.

An important element of the sociology of law is social change. The new democratic framework by UNTAC and the constitution that came with was an obvious attempt to bring about change in the legal and social order in Cambodia. But for law to work as an instrument of social change, two processes need to be realized: institutionalization and internalization of patterns and behavior. For this to happen, a strong enforcement mechanism is needed. Alongside, however, certain conditions need to be fulfilled. Vago cites William M. Evan and counts the seven suggested conditions which need to be fulfilled for law to bring about social change. One of the conditions is that the values presented must be compatible with the existing ones.³⁵⁷ Applying this to Cambodia, we have already seen that the values presented with the UNTAC democracy were not correspondent with the values in the Cambodian

³⁵⁷ Vago, p. 326

society at that time, or perhaps even today. Another condition is that those enforcing the law must themselves be very much committed to the change intended by the law.³⁵⁸ Enforcement in Cambodia is partially made by the government who is flawed with patronage and corruption, and furthermore by the biased and corrupt judiciary. Now, given those facts, we realize that those enforcing the law in Cambodia are probably not committed to the change their constitution provided when it was enacted. Instead of being interested in the democratic rules, the judiciary was (is?) interested in whatever gives them the most personal gain. This is the legal culture in Cambodia.

Yet again, we have to differentiate the ECCC from this legal culture. Keeping in mind that the ECCC is not an independent institution separated from the Cambodian system, and keeping in mind that it was showed earlier in this thesis that the Cambodian legal culture cannot be separated from the Cambodian judges when they assume the position of an ECCC official, we must however note the different ideas and driving forces behind the ECCC comparing to the Cambodian judiciary. The discussion about law and individual rights can sometimes be somewhat metaphysical since behind it are ideas about the compelling power of a state, enforcement mechanisms, political power and philosophical ideas. The discussion about the ECCC however relates directly to something that the Cambodian society has experienced. Because behind the ECCC lies a factual historical happening, the atrocities by the KR.

Accordingly, the ECCC can nevertheless work as a legal instrument for social change. One of the differences between the tribunal and the Cambodian judiciary is that the legal enforcement mechanism is stronger. Comparing to the Cambodian judiciary it has more transparency, a review and pressure by the international community as well as pressure by its people. The existence of the ECCC and the value that it presents does indeed coincide with the existing ones in the Cambodian society since people want justice for what was done between 1975-1979 by the Khmer Rouge. Additionally the government is interested in the ECCC working in accordance to protocol because of the pressure by the people and because of the pressure by the international community. And even if there is some resistance and attempt to influence, the interest still exists. The tribunal could not have existed without the acceptance and desire by the Cambodian government. Simultaneously, there are the

³⁵⁸ Op.cit.

international judges in the tribunal which are presumed to guarantee that the practices in the ECCC stay neutral and uninfluenced by the traditional Cambodian practices.

Going back to Ehrlich, he contends that there is a difference between statutes and norms. Statutes only create state institutions, they do not create norms per se. Society does, and through time this is interpreted in “Legal Provisions”, as he refers to it. Afterthought thus creates the norms stated in law, i.e. after we have already experienced the norms in society, we expound them in legal provisions.³⁵⁹ But these norms only exist as long as the preconditions for them in society exist. When society changes, and it does constantly, norms change. The social order is transformable: new conditions give new interests, which leads to new conflicts that in turn lead to new decisions and result in new legal provisions. And again, afterthought plays its role in the changing of a society.³⁶⁰ This would explain the creation of the ECCC. It has definitely taken some afterthought to create an institution that can adjudicate the atrocities perpetrated by the Khmer Rouge. After the Khmer Rouge changed the Cambodian society, a change was needed yet again after they were defeated. However, even with the PRK take-over and the defeat of the KR, they did not leave the Cambodian scene but continued to struggle for power. Naturally, this affected the Cambodian society. And in addition to the KR, there was an internal struggle for power between the then warring factions. All of this scarred the Cambodian society, hampered development and stabilization. And thus social change was slow. But when things somewhat changed and stabilized, and the cry for adjudication of the KR became loud enough and obvious enough it was time to “set the legislative machinery into motion,”³⁶¹ as Ehrlich says.

A legal culture is transformed by social change, according to Friedman. The legal culture is “what people think about the law, lawyers and legal orders; it means ideas, attitudes, opinions and expectations with regard to the legal system”. And then something happens in the society that changes it, e.g. a revolution. This does not change the legal order automatically or immediately, but does spin the wheel and the motion towards legal change starts slowly. When this happens, people’s attitudes and expectations change, and they formulate new demands that in turn leads to legal change. “Legal culture translates social change into legal change”, as he puts it.³⁶² The Cambodian society experienced political instability and violence during a long time, and then the Paris Peace Accords happened. This

³⁵⁹ Ehrlich, p. 138-139

³⁶⁰ Op.cit., p.139-140

³⁶¹ Ibid., p. 140

³⁶² Lawrence M. Friedman in Freeman, p. 189

brought about a new political system and a new constitution. But just like Friedman says, it did not change the Cambodian system immediately. However, in due time, people started to know their rights. And even though they did not and still might not believe in the constitution, they would like it to be true and hope it to be true some day. Cambodians now want democracy, they want their rights to be recognized and they want to know the truth. This can be demonstrated by Cambodian human rights NGOs such as LICHADE as well as by the mere existence of the ECCC. Thus, the people's expectations have changed, something that surely has changed the legal order. And accordingly, the ECCC exists because the Cambodian society has changed into one that demands justice to be served as regards to the KR atrocities.

8. Concluding Remarks

The ECCC's credibility being within Cambodia's politically influenced and corrupt system is highly critiqued. So what does it mean that the ECCC is resting on the Cambodian legal system that is shown to be affected by the country's politics? It means that the system allows for the possibility of the Cambodian government to exert political influence over the tribunal,³⁶³ just like it does with its own judiciary. If judges are politically tainted, so might their decisions be. In extension, that would affect the tribunal's practices.

In the courts of Cambodia, it is established that corruption, bribery and political interference affects the Cambodian judges' decisions.³⁶⁴ The ECCC is a mixed tribunal with international staff, but the dominance within the structure is Cambodian. Because of this, the chances for political influence are even higher.³⁶⁵ It is therefore held that the ECCC decisions will be biased by politics and not justified with law.³⁶⁶

There are laws establishing the ECCC and governing the relationship between the Cambodian government and the UN, and there are internal rules interpreting what was left unresolved but there are still issues that are unclear.³⁶⁷ When a conflict thus arises, it will be up to the judges to interpret.³⁶⁸ This is something that could obviously affect the ECCC

³⁶³ Linton (2005), p. 19

³⁶⁴ Worden in Ramji and Van Schaack, p. 191

³⁶⁵ Ciorciari, p. 46-47 *See also Worden, in Ramji and Schaack, p. 171-173*

³⁶⁶ Ciorciari, p. 51

³⁶⁷ McGraw, in Öjendal and Lilja, p. 257

³⁶⁸ Worden, in Ramji and Van Schaack, p. 173-74

practices. Regardless of the issue, and regardless of whether it is international or Cambodian judges in the majority, interpretations set precedents. And let us imagine the issue being a political one and the Cambodian judges being in the majority, and them being corrupt or politically influenced - it takes convincing one international judge to get supermajority and thus setting a precedent that is politically favorable to the government of Cambodia. However, this is a hypothesis that assumes that the international judges are convincible. Although they too are human, in reality international judges are trained to be independent, objective and impartial and they are experienced with the kind of questions that are adjudicated in the tribunal. This is opposite of the Cambodian judges. Ergo, one can assume the possibility but question the probability.

So far, we have seen the international judges being steadfast in their opinions, as have the Cambodian. An example where these two sides have been polarized in a politically sensitive case is the aforementioned disagreement between the former international co-prosecutor Robert Petit and Cambodian co-prosecutor Chea Leang regarding more suspects in the tribunal is an example.³⁶⁹ The PTC's stance was this: the three Cambodian judges were against more submissions to the co-investigating judges to open judicial opinions, while the two international were for. And since the rules³⁷⁰ are such that if there is not an affirmative vote of four judges (supermajority) to block the submissions, the action of the International co-prosecutor will be executed.³⁷¹ Whether it is just a circumstance that the sides were divided into one international and one Cambodian, one can only speculate. It does however leave room for questioning. But even in those cases where the Cambodian judges are not able to exert political influence on the decisions, they could, the way I see it, affect the practices by delaying the process this way.

A condition for political influence in the ECCC is that the judges actually are biased. I do not believe it is enough to say that the Cambodian legal system, on which the ECCC rests, is corrupt and politically influenced. There needs to be some actual correlation to the ECCC. I believe that the appointment mechanism is such a correlation. The Minister of Justice who is part of the Council of Ministers, which is dominated by the CPP, also holds a seat at the

³⁶⁹ Supra at section 6.4.6 para. 3

³⁷⁰ See Internal Rule 71(2) and 74(1), available at: <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv4-EN.pdf> 26 Nov 2009

³⁷¹ See Disagreement no. 001/18-11-2008-ECCC/PTC, para. 45 available at: http://www.eccc.gov.kh/english/cabinet/courtDoc/425/Public_redacted_version_-_Considerations_of_the_PTC_regarding_the_Disagreement_between_the_Co-Prosecutors_pursuant_to_Internal_Rule_71_%28English%29.pdf, 19 April 2010

Council of Magistracy. This in turn ensures at least some political interference in the said body.³⁷² The Council of Magistracy chooses the Cambodian judges for the ECCC. Ultimately this means that Cambodian politics are not separated from the ECCC, but do de facto come in contact with the mixed tribunal.

But judges that might have been bribed or corrupt prior to the ECCC might have freed themselves from this pattern. They were trained prior to the opening of the tribunal. However, I question if one can truly free oneself from prior influences, possibly influences during long periods of time. And even if that is possible, I question whether judges that still have connections to politicians can make independent and objective decisions knowing that powerful politicians might oppose them. But even so, judges themselves might have political opinions. It is not uncommon that judges are politically active, or that they have political opinions. And political opinions are intertwined with values. The question is then, if such a question is on the stand, whether a judge can disconnect oneself from its own opinion. If one ponders that this is questionable even in democratic states, one realizes that is actually possible if not probable in Cambodia which has a tradition of corruption and impunity. And so, if the judges are not able disconnect themselves from politics, how can they make decisions separated from politics? And if the decisions are not separated from politics, how can independence and fairness be guaranteed? And if independence and fairness cannot be guaranteed, how can this promote the notion of accountability and change the culture of impunity? These questions remain debated.

Political questions aside, corruption remains a fact and so does the poor economic situation in the country. The judges' low salaries make way for an acceptance of bribery, and that together with a culture that does not necessarily respect law very much continues to leave a door open for a sustainment of corruption, even in the ECCC.

Conclusively, the answer to the question whether and how the ECCC is affected by the Cambodian hybrid system might be given away by the question itself. It is a hybrid system. It has dual identities, one being an internalized traditional one, the other being a democratic one, introduced by the international community and holding the ECCC within it. The people do not believe in the norm of democracy yet. Hence, even if there is consensus on what their community should look like, even if there is a constitution stipulating these norms, they are not yet convinced that these ideas govern the country. And they are right, because

³⁷² Ratner et al., p. 347

despite the rules of law, practices of patronage and corruption tell us otherwise. The ideas themselves do not change reality, internalization and socialization is required. Ergo, democratic values and international standards of justice have not yet become the norm in Cambodia because they are not yet practiced. However, if the ECCC holds its practices to international standards of justice, these norms might eventually become reality in Cambodia.

Finally, my thoughts are that if corruption and political interference affect the ECCC's practices, it might lead to a disbelief in other international tribunals in the future. The Nuremberg Trials set the base for successful international trials.³⁷³ ICTY is a successful example of an international tribunal. It established a trust for such tribunals in the international community and showed that even government officials and leaders held responsible for their actions. The ECCC is a first example of a mixed tribunal. It could set precedence. A failure might affect the possibility for mixed tribunals in the future and in extension, international ones. If the tribunal ultimately is influenced by Cambodia's corrupt politics, the notion of a neutral mechanism for adjudicating atrocities against human kind might get lost. It might cause public outrage, and disappointment. And the last thing we need in a world full of conflicts is the notion that not even the international tribunals that are supposed to safeguard human rights are failing them as well as the people that have lived through these evils.

³⁷³ Internationella brottmålsdomstolen ICC, Amnesty International, available at: <http://www2.amnesty.se/icc.nsf/ffc3926fc473d909c12570b90033f05f/cfc99632a4ae7409c1257287005b4e9f?OpenDocument> 25 November 2009

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